

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6167

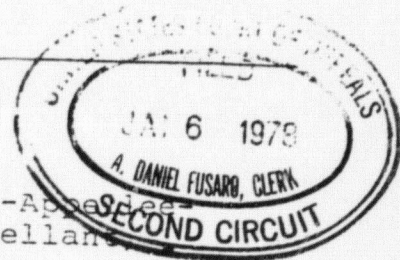
UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-6167

ROBERT A. LENNON,

Plaintiff-Appellee
Cross-Appellant



-against-

UNITED STATES OF AMERICA,

Defendant-Appellant-
Cross-Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX

DAVID G. TRAGER
United States Attorney,
Eastern District of New York

PAGINATION AS IN ORIGINAL COPY

1
2 UNITED STATES DISTRICT COURT

3 EASTERN DISTRICT OF NEW YORK

4 -----X
5 ROBERT A. LENNON, :

6 Plaintiff, :

76-C-396

7 -against- :

8 UNITED STATES OF AMERICA, :

9 Defendant. :

10 -----X

11
12 United States Courthouse
13 Brooklyn, New York

14 March 15, 1977
15 10:30 o'clock A.M.

16 B e f o r e :

17 HONORABLE MARK A. COSTANTINO, U.S.D.J.
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20
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22
23

24 MICHAEL PICOZZI
25 OFFICIAL COURT REPORTER

Appearances:

JOSEPH KELNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

1 MR. KELNER: May I proceed, your Honor?

2 THE COURT: Yes, please.

3 R I C H A R D F A R R E L L, a witness called on behalf
4 of the plaintiff, was sworn by the Clerk of the
5 Court, and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. KELNER:

8 Q Mr. Farrell, what is your business or your
9 occupation at the present time?

10 A Vice President in charge of mechanical oper-
11 ation for Mebco Industries.

12 Q What is the nature of the Mebco company's
13 business?

14 A Electrical contracting, refrigeration,
15 construction, air conditioning.

16 Q What is your position there?

17 A Vice President.

18 Q For how long have you been with Mebco?

19 A Approximately seven years.

20 Q Could you tell us what your occupation was
21 before that?

22 A Electrical, basically electrical, electrician,
23 mechanical.

24 Q For how many years have you been in the elec-
25 trical field?

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A Twenty, twenty-one years.

Q Some time in 1969 or before 1969, did you meet with Robert Lennon, the plaintiff in this case anywhere?

A Yes.

Q Would you tell the Court when and where it was that you did meet him?

A The first time I met him was I was working with Rothbell Electric. We did a job for Impressive Jewelers.

Q Where was Rothbell Electrical at that time?

A Three doors away.

Q What street was it on?

A Between Brooklyn and 34th on Church Avenue.

Q Here in Brooklyn?

A Yes.

Q At that time, what was the nature of your job with Rothbell?

A Foreman, manager for the company.

Q At that time, do you recall whether or not Mr. Lennon was employed as an employee by the Impressive Jewelers?

A Yes.

Q What was the nature of his employment?

A A salesman, helper.

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Q Is that when you met him?

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A Yes.

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Q Tell us briefly what the circumstances under which you happen to meet him were?

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A We were doing the work there in the store.

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I was doing physical work at the time. He kept asking us, how do you do this and how do you do that, what is a panel, how do you put this in here. He kept asking questions like that, and how do you wire the cases, how are we going to do it.

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Generally he bugged us and followed us around on the job and seemed very, very interested and kept -- just kept after us for information as to what we were doing and how we were doing it.

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He had a -- he just wanted to search for this knowledge.

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MR. RUDOFISKY: I object and ask that it be stricken.

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THE COURT: Yes, it is the operation of his mind.

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Q In any event, with the interest that he is showing, did there come a time when he went to work for your company, Rothbell Electric?

A Yes.

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Q Do you remember about how long he worked for Rothbell Electric until he went into military service?

A About six or seven months.

Q In the year 1969, is that correct?

A That is correct.

Q I am leading if there is no objection.

Was it from Rothbell Electric that he went directly into the service, enlisted into the Marines?

A Yes.

Q During that period of six or seven months, which is your memory -- I think he said about eight months -- whatever it was, in 1969, would you describe what he did with your company in the electrical field?

A Well --

Q Everything you can recall.

A He was a general helper. He worked as a helper working with myself, with Dave, one of the other men. I don't remember which men now.

He worked basically finishing up work, pulling wire, clean-up work. He was an excellent worker. He was always there. He always showed up.

He would do anything we asked him to do.

Q What did he do as a helper?

A He made permanent connections. We would do

1
2 the preliminary work, the technical work, and he would do
3 the final connections and the plates and basic electrical
4 work. He was doing pulling work, working on a printing
5 press in Manhattan, or overhead service in Brooklyn -- we
6 did that a lot. He would be pulling BX cable --

7 Q When you say pulling, you mean placing the
8 cable --

9 A Snaking it into the wall.

10 Q Could you give the Court some idea of how he
11 is work?

12 A He was more than capable as a helper. He had
13 fantastic potential as far as a helper.

14 Q Why do you say he had such a good potential?
15 On what are you basing that?

16 A He wanted to learn. That was the main thing.

17 Q How did he show that?

18 A He -- I know he had most of the books we had
19 out of the shop.

20 Q Books on electricity?

21 A Yes. The Burnes book, the company book, the
22 books you generally get from the field. He was always
23 doing that stuff. When driving around I know he would read
24 them. I know he went to the library. We sent him over
25 there.

1
2 Q For what purpose?

3 A Pick up books on basic electricity.

4 Q To your knowledge, did he study those books
5 on his own time?

6 MR. RUDOFISKY: Your Honor, it's impossible for
7 the witness to answer to his knowledge what Mr. Lennon
8 did on his own time.

9 If counsel wants to develop it he should have
10 gone into it with greater detail with Mr. Lennon.

11 MR. KELNER: The plaintiff did testify to
12 that. I think it is cumulative anyway.

13 Q Can you tell us about his attendance record,
14 how frequently he attended, while he worked for Rothbell?

15 A He always showed up. He always was dependable.

16 Q Now, when he enlisted into the Marines, before
17 he left, was there any arrangement concerning his future
18 possibilities of employment under your guidance?

19 A Yes, I told him he would have a job when he
20 came out either from me or from Dave. Mr. Rothbell told
21 him the same thing.

22 Q Mr. Rothbell was the owner of the company?

23 A Yes.

24 Q Now, after the discharge of Mr. Lennon from
25 military service, did you see him immediately when he came

back or did there come a time later when you saw him later and had occasion to employ him?

A The next time I say Bobby, I saw him once when he was in the service in uniform. Then when he came out of the service I didn't see him.

He had gone some place else wherever it was. I had gone to Mebco Industries.

Q That is your present company?

A Yes. Then Bobby called me up and actually Dave Rothbell called me up and told me that Bobby had the accident and lost his limb.

Q He lost his leg?

A Yes. Dave told me that Bobby would be calling me. I said fine.

When he called me he spoke to me about work and I said "Come down, I will give you a job as a dispatcher at Mebco."

Q You gave him a job at Mebco?

A Yes.

MR. KELNER: I am going to lead.

Q Was that in 1976?

A Yes.

Q How long did he stay with Mebco?

A Six or seven months.

Q He had lost his leg, is that correct?

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A That is correct.

Q Can you describe how he did? How steadily he was able to work, and how he went along during that period?

A That was the disappointing part to me because I hired him. He couldn't function properly.

The leg was constantly a problem.

Q What was the problem?

A His attendance was a big problem. I put him in the dispatcher's office.

Q What do you mean by dispatcher?

A That is where we dispatch all the men from the company. Either through telephone or to a radio.

His attendance was poor because of the leg. He was constantly in pain with it.

He would work -- his hours were ten in the morning or eleven in the morning until ten at night. He used to stay late. He took off his artificial limb at night.

Q In the shop?

A In the dispatcher's office.

Q Yes?

A He would push himself around on the chair to make the paper work in the office.

Q How did that work out as far as the company

1 requirements were concerned?

2 A Not very well because the service supervisor
3 at the time, Mr. Muller came to me and he told me --

4 MR. RUDOFISKY: Objection to what he was told.

5 MR. KELNER: Under the rules of evidence you
6 are not allowed to tell me what somebody else told
7 you.

8 A As far as it went, the people in the dispatch
9 office were not satisfied with the attendance. They couldn't
10 depend on him because he was going to the doctor and he
11 would be in one morning or in for four days and out for a
12 day.

13 It was very difficult.

14 Q Could you tell us what was the reason for
15 his discharge?

16 A Basically he couldn't be there to operate,
17 to function. And I have to have somebody in the dispatch
18 office who has to be there minimum five days a week.

19 Q When he was working there, was there any job
20 there where he could just sit still at a desk and somebody
21 bring him a sandwich or was he required to get up and move
22 around?

23 A You have to get up and move around.

24 Q For what purpose?

25

1
2 A First of all, you have a desk that's twelve
3 feet and you have four sets of phones on it. If one
4 dispatcher happens to go out for a minute and the other
5 phone rings he has to get up and go to the other phone.

6 If somebody comes in from parcel post, you have to
7 get up, or receiving a ticket or something, you have to run
8 into the back to pick up a part for a mechanic or run to
9 purchasing to find out if a part is there for a mechanic.

10 Q What happened when he was required to get up
11 from the desk and --

12 A This is where we had problems in the dispatch
13 office. This is one of the reasons we had to let him go.

14 Q But for the physical disability, can you tell
15 us anything about his willingness or attempt to try to do
16 a good job other than the fact he was physically handicapped?

17 A Personality-wise everything was fine. He worked
18 and got along well with people.

19 Just the fact that he was in the dispatch office --
20 that is a world of its own.

21 Q During the service when he came to see you,
22 I think you mentioned you seen him awhile in uniform, is
23 that correct?

24 A Yes.

25 Q He was on leave at home or something like that?

1
2 A Yes.

3 Q Was there any discussion between you and he
4 on the subject of employing him or getting him into the
5 union?

6 A The discussion was I would employ him and get
7 him a job. There was no problem there.

8 Q Since you have joined Mebco, I think you said
9 seven years ago?

10 A Yes.

11 Q Is that a union job?

12 A Yes.

13 Q But for his handicap, I ask you, would he have
14 been eligible for employment with Mebco if he had not lost
15 his leg?

16 A Yes, absolutely.

17 Q What is the procedure, what had the procedure
18 been since you came to Mebco about hiring people, either
19 as an apprentice or journeyman electrician and getting them
20 into the union for the purpose of pursuing their work with
21 you?

22 A Basically, what I would do as manager of the
23 department at that time, I would of course get Bobby, get
24 all his information, give it to Mr. Eisenberg --

25 Q Who is Mr. Eisenberg?

1
2 A The owner. It's actually M. Eisenberg and
3 Brothers.

4 Q You are still there as vice president?

5 A Yes.

6 Q Is that correct?

7 A Yes.

8 Q Can you give us an idea of the size of the
9 company? How many employees, the general approximation of
10 business -- I don't want any trade secrets.

11 A Twelve million dollars.

12 Q That's the volume annually?

13 A Yes.

14 Q How many electricians or people doing elec-
15 trical type of work, work under your own supervision?

16 A Forty, forty-eight electricians.

17 (Continued on next page.)
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Q What is the general nature of Nebco's business?

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A The general nature?

4

Q What do they do?

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A Electrical contracting, electrical construction,

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service, motor work, control work. That's only one part of

7

the division. Then we have motor shop and compressor shops,

8

refrigeration, air conditioning.

9

Q Your division is the electrical?

10

A I also take care of refrigeration.

11

Q Is that completely a unionized shop?

12

A Yes.

13

Q How is the union known --

14

A It is Electrical Local 3.

15

Q What is the procedure where you take one who

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is non-union, say Bobby Lennon -- I am trying to put it down

17

to a focal point of January 1973, I ask you to assume there

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has been testimony but for the loss of his leg he would have

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been physically able by January 1973 to start working, what

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would the procedure be to get him into the union and moving

21

ahead?

22

A We would sponsor him. Nebco Industries would

23

sponsor him.

24

I would go to Mr. Eisenberg and he sits on the board

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for picking the workers at Local 3, as most large contractors

1
2 do --

3 Q Yes?

4 A Mr. Eisenberg would sponsor him.

5 MR. RUDOFISKY: I object to any testimony as far
6 as what Mr. Eisenberg would do. If he wants to tell
7 us what he would have done, that is all right.
8 Beyond that I think we are getting speculative as to
9 what other people would do.

10 MR. KELNER: May I ask a further question for
11 foundation?

12 THE COURT: Yes.

13 Q Based on what was being done, what was the
14 procedure? What was the procedure and hiring people and
15 getting them employed by Mebco and qualified under the
16 union contract?

17 MR. RUDOFISKY: I would like to ask one ques-
18 tion on the voir dire.

19 THE COURT: Yes.

20 VOIR DIRE EXAMINATION

21 BY MR. RUDOFISKY:

22 Q Mr. Farrell, before Mr. Eisenberg or anybody
23 else on behalf of Mebco would do any sponsoring for anyone,
24 was it the custom or usually would Mr. Eisenberg agree with
25 you, was this a necessary prerequisite? In other words

1
2 he would say --

3 A No, I would not agree with that. The point is
4 Mr. Eisenberg would never get involved in going out and
5 hiring a helper. He will depend on me to do that.

6 Q You would make the initial decision?

7 A Yes.

8 Q Then go to Mr. Eisenberg?

9 A Yes.

10 Q You would say, sir, here is somebody we would
11 like to bring into the company, we would like you to go
12 to the union and --

13 A Yes.

14 Q If Mr. Eisenberg disagreed with you he had to
15 make some judgment that you are right or wrong, and maybe
16 most of the time he went along with you, but he had to
17 decide whether you were right or wrong?

18 A That doesn't happen to be true. Mr. Eisenberg
19 would say "Is that the guy you want? He will be working for
20 you." That's the way it was.

21 Q He had to go and do something then?

22 A Not really. He would go before the board when
23 our man's application came up and he would question the man
24 and sign the application.

25 Q He questioned the applicant?

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A Yes. They talk to the helpers.

DIRECT EXAMINATION (Continuing)

BY MR. KELNER:

Q Did he ever turn down, in all the years, seven years, turn down anybody for employment after you would recommend and point out an individual you wanted to work under you?

A No.

Q Was that the standard procedure followed by you and Mebco and Mr. Eisenberg?

A That is correct.

Q Assuming then -- withdrawn.

Was it your intention to re-employ Mr. Lennon but for the fact that he had this disability?

A That is correct.

Q What is, and what was in 1973, the procedure with regard to the first range or first designated job on the lowest scale with union qualifications?

A The first year, helper.

Q Is that also called an apprentice?

A Yes.

Q How many years would one have to work as a union apprentice under union regulations until one would go to the next rung on the ladder?

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2 A It's broken down in years, first, second,
3 third, fourth, then one year in MIJ, pre-journeyman mechanic,
4 and the fifth year you get your A card.

5 Q The fifth year is journeyman A mechanic?

6 A Yes.

7 Q Based upon your knowledge and your personal
8 observation of Mr. Lennon, can you express to this Court,
9 based on your own observations, your opinion as to whether
10 he was qualified to become a first year apprentice in 1973
11 except for the fact that he had this physical handicap?

12 A As far as his knowledge, definitely.
13 He would have more than enough knowledge from the Rothbell
14 job to handle a helper's job in Local 3.

15 Q At our request, as counsel for Mr. Lennon,
16 have you prepared a year by year statement of what the pre-
17 vailing wage rates were including fringe benefits starting
18 with the year 1973?

19 A Yes.

20 Q Who computed that year by year statement at
21 our request so that the Court would have it before it when
22 considering the laws of earnings from 1973 to date, was it
23 you?

24 A Correct.

25 Q Also at our request, have you formulated what

1
2 under union contract rates the applicable salaries will be
3 after five years for a journeyman A mechanic starting in
4 1978?

5 A That is correct.

6 Q Is there presently in existence a union contract
7 which applies to the whole electrical industry which already
8 as of now states the union wage scale that will apply to
9 1978?

10 A No. The new contract will be up this year.

11 Q It will be up?

12 A Yes.

13 MR. KELNER: With your Honor's permission, I
14 think it may save time for you, if you permit me,
15 to hand you a schedule which contains the data I just
16 inquired about. It will facilitate following the
17 testimony.

18 MR. RUDOFISKY: I don't have any objection to
19 putting in the union contract. But I don't think
20 there has been any showing that this witness has any
21 business responsibility or particular expertise for
22 creating such a summary that would be due working
23 under the union contract.

24 I think that is a necessary prerequisite.
25 There are figures in computations on here that I

1
2 assume represents his opinion as to what --

3 THE COURT: I will accept it. He was able
4 to compile such a list, and number two, he has been
5 working there which gives him some area of knowledge.

6 MR. RUDOPSKY: The fact he compiled a list
7 doesn't make it accurate.

8 THE COURT: I know that.

9 MR. RUDOPSKY: I am not suggesting the witness
10 is incompetent. I think we might hear a little more
11 about his ability to compile such a list.

12 THE COURT: What weight I would give it after
13 listening to him would be within the discretion of
14 the Court. I think anything that can assist the
15 Court in a non-jury case should be given.

16 MR. KELNER: I would like to go into it, if
17 you will give me an opportunity.

18 THE COURT: Okay.

19 MR. KELNER: I think it will become clear.

20 DIRECT EXAMINATION (Continuing)

21 BY MR. KELNER:

22 Q Sir, these figures are not actually in your
23 own handwriting, are they?

24 A No.

25 Q However, did you actually prepare the figures

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and give them to us so we can prepare this for courtroom use for the Court in order to follow your testimony?

A That is correct.

Q Will you tell us whether or not you had a personal familiarity with prevailing wage rates for the years 1973 through 1977 for first year apprentice?

A Yes, absolutely.

Q Is that on the basis of your everyday day to day work as vice president or dealing in Local 3, the electrical union?

A The figures come from our contract and what we pay as a Local 3 contractor.

Q When you say we pay, you mean Mebco?

A Yes.

Q Is the amount that you pay, that is Mebco pays, the prevailing union scale wage rate?

A That is correct.

Q Applicable to the whole industry, is that correct?

A That is correct.

Q I notice that on this -- may the record indicate I have given counsel and the Court and I and the witness all have a copy of the same document which we can mark later --- on this paper which I haven't identified, other than my

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2 description, I see the year 1973 and you have a sum of
3 \$8,490 and next to it there are words written "First year
4 apprentice."

5 How did you compute for that year's earnings of
6 \$8,490?

7 A For that year his hourly rate by the hour for
8 1973 would have come out to \$3.05 an hour. Then there is
9 an additional fifty-three percent benefit and annuity,
10 social security, that's where you come up with \$8,490.

11 Q How many hours a week did you compute that on?

12 A Thirty-five.

13 Q You said also there is a package of fringe
14 benefits?

15 A Yes.

16 Q What is included in that package. I think you
17 said -- did you say fifty-three percent?

18 A Approximately fifty-three percent. You have
19 in there also social security --

20 Q Social security?

21 A Yes, paid by the company.

22 Q Yes? That is paid by the company on behalf of
23 the worker, is that correct?

24 A That is correct.

25 Q That is under union agreement, is that right?

1
2 A Yes.

3 Q What else?

4 A \$7.00 a day annuity, plus additional annuity,
5 \$1.00, and annuity fund as of this year, and we have pension
6 and welfare 7 percent. Trust fund 1 percent. Vacation
7 5.7 percent. Paid holidays, 5.341 percent. Joint industry
8 board dues, .25 percent.

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Q Does that in essence comprise the package of benefits?

A Another half percent for education funds.

Q I won't go into all the details.

Was this an exact computation, to the best of your ability, based on the prevailing rate for a first-year apprentice, \$8,490?

A Yes.

Q I notice 1974 the amount is \$10,160, why was difference?

A There was a rate increase. Second year helper gets a different hourly rate, three sixty-five an hour.

Q 1975, it says \$12,670?

A There's an increase every year.

Q 1976, you have \$15,450?

A Yes, for the year.

Q Was that based on actual computations?

A By hourly rate.

Q In 1977, this year the amount was \$17,120?

A That is correct.

Q This year, for example, what is the hourly rate prevailing under the union scale for the fifth year?

A Six fifteen an hour.

Q How about overtime? Do these annual totals

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which you computed here from 1973 to 1977 include anything at all for overtime?

A Nothing.

Q Is there overtime work available on which these men earn additional monies?

A There is.

Q Can you give us an average based on the actual performance, actual available work, as to how many weekends the average apprentice is able to earn money?

A Right now my men are working on an average of ten, fifteen weekends a year.

Q You have not included that in this annual total?

A No.

Q On weekend time, do they get paid at the same hourly rate?

A no.

Q What is it?

A Time and a half.

Q For an average weekend, can you tell us how much would, say, a fifth-year apprentice earn?

A Fifth-year apprentice, I didn't calculate fifth year. I could do it.

Q Do you have a computer with you?

A Yes.

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2 Q Do you use that computer in your work function?

3 A Yes.

4 Q Okay.

5 (Pause.)

6 A Fifth year mechanic would make, for working a
7 weekend, \$147.60.

8 Q That would be based on how many hours?

9 A Sixteen hours. Two eight-hour days.

10 Q At time and a half?

11 A Yes.

12 Q Sir, after five years you told us that the usual
13 routine would be for the fifth-year apprentice to be qualified
14 to become a journeyman A mechanic?

15 A Yes.

16 Q Under the union scale prevalent for this year
17 or next year, what would a journeyman A mechanic earn without
18 any overtime at all?

19 A Without any overtime at all?

20 Q Yes.

21 A \$34,110.

22 Q Is that your own computation?

23 A Yes.

24 Q Give us the hourly rate that the --

25 A \$12.25 an hour.

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Q Are those minimum union rates?

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A Minimum, yes.

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Q Are there journeyman A mechanics who earn more than that without overtime?

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A Yes. There are men paid over scale, depending on different jobs.

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Q That is the least they can be paid?

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A Yes.

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A The A division has been averaging 9 percent a year.

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Q Can you explain that?

A Nine percent increase in pay a year.

Q If you were to go back to 1977, 1976, 1973, the journey man A mechanic would have been earning about 8 or 9 percent less in those years from each proceeding year?

A Yes. The last contract was 27 percent.

Q What do you mean by that?

A Total 27 percent increase broken down into three installments over a period of 28 to 30 months.

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2 Q The contract was for like three years ahead and
3 each year there would be like a 9 percent raise, is that correct?

4 A That is correct.

5 Q You are telling this Court, based upon going
6 back over a number of years, there was an average of 9 percent
7 increase every year?

8 A Yes.

9 Q Was that tied into the cost of living or
10 government statistics or anything like that, if you know?

11 A No. I cannot say. This was given to them on
12 a benefit annuity and direct monies.

13 Q When does the current contract expire, if you know?

14 A I am not positive.

15 Q Do you have any way of knowing whether this
16 9 percent average annual increase that has been going on for
17 the past number of years is going to be at that rate or more
18 or less?

19 A I can't honestly say that it will. Going on
20 what has happened before and the way they settled the contract
21 over the last five or six years, it would seem to be a trend.

22 Q That is for the future, all right.

23 A Yes.

24 Q When your company gets an increase based upon
25 the industry-wide contract between the associations and the

Farrell - direct

union, you have to comply with whatever the new rate will be?

A Yes.

Q You would have to charge more for your contract work?

A Yes. Local 3 only signs retroactive contracts.

Q What do you mean by that?

A Nobody goes out. The men work and then they negotiate for the contract.

Q I see.

As of the present time, this \$34,110 computation that you've made, that is the current rate that is now being earned by journeymen A mechanics?

A Correct, with benefits and annuities.

MR. KELNER: I think I have completed this witness.

THE COURT: All right.

(Pause.)

MR. KELNER: Just one more thing.

Q Sir, assuming that a five year apprentice becomes a journeyman A mechanic, does he automatically -- is he automatically limited to whatever the prevailing union scale is or is he free to earn additional money?

A He is free to earn additional money.

Q How is that determined?

1
2 A Capabilities.

3 Q This is minimum, is that correct?

4 A This is a minimum. If a man shows quality of
5 leadership where he can take a gang of men --

6 Q How about the men in your own company,
7 journeymen & mechanics, is there something -- can you tell us
8 what they actually earn annually?

9 A They actually earn those numbers. Those are the
10 numbers.

11 Q Those are the numbers?

12 A Those are the numbers. There is no doubt. This
13 is a joint industry board standard and we can't pay any less.
14 When we work a man 52 weeks a year, that is what it is. If
15 they work overtime, that is above that.

16 Q Sir, let's assume there are slow, slack periods;
17 is the man during some slack period -- is he able to go out
18 and work on his own anywhere at union scale?

19 A He can go out and work on his own. Many men
20 work side work.

21 Q Even though working 52 weeks a year for Nemco,
22 they are still able to work on the side?

23 A Yes.

24 Q This is minimum scale?

25 A Yes.

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3 Q One more thing, the age, is there any compulsory
4 retirement age for a union employee?

5 A No.

6 Q Do they --

7 A Not in local 3. Not to the best of my knowledge

8 Q By and large, it depends on one's ability, but
9 do they oftentimes work for the Social Security retirement age
10 of 65?

11 A Absolutely. We had a man retire from our company

12 Q At 65?

13 A Yes.

14 Q Are there some who work beyond 65?

15 A There are some, but we don't have any old men
16 with us now.

17 MR. KELNER: All right, you may inquire.

18 (continued next page)
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CROSS-EXAMINATION

BY MR. RUDOFISKY:

Q Mr. Farrell, did Mr. Lennon ever come to you in 1973 to ask about a job?

A Did he come to me?

Q Did he contact you at any time in 1973 to ask you about a job?

A No.

Q Did you have any jobs open in 1973?

A Yes.

Q You testified with respect to the problems that Mr. Lennon had while he worked for the company in 1976?

A Yes.

Q By the way let me backtrack for a moment -- when did you become vice-president in charge of mechanical operations?

A 1974.

Q Prior to that time were you responsible for hiring --

A Electrical division manager, responsible for MSDMA --

Q My question is were you responsible for hiring?

A Absolutely.

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Q Is your testimony that Mr. Lennon had these problems that you discussed throughout his tenure with MESCO?

A Yes. His leg was open or festering, whatever you want to call it.

Q This led to his discharge as far as you are concerned?

A Yes.

Q Could you tell us a little bit about your relationship with Mr. Lennon? Do you have a personal relationship with him? Do you consider yourself a friend of his?

A Yes, I would say he's a friend. It all depends on how you want to put a friend. We've gone out and had a few drinks together --

Q You've seen him outside the office?

A No, after work and then I went home and he went home.

Are we very close personal friends? I haven't seen him personally since he left the company except for today.

Q Who is Lawrence S. Ritter? Do you know who he is?

A Yes, I met Mr. Ritter before.

Q Is he sitting at counsel table this morning?

A Yes.

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Q Does he have anything to do with your job or company?

A No.

Q I direct your attention to the bottom lefthand portion of the summary -- I'll call it a wage summary for lack of a better term?

A Um-hum.

Q Do you see his name there second page bottom left?

A Yes.

Q Do you have any idea how his name got there?

A I would surmise he put it there.

Q After you prepared this?

A I gave him all of the figures.

Q What figures?.

A Hourly rates, percentages and what the rates were per year and I gave him all of the years from '70 through '77.

Q You gave him the base figures?

A Correct.

Q And then, as far as you know, he was the one who prepared this, physically prepared it?

A Correct.

Q You didn't prepare it?

1 A I didn't prepare --

2 Q I understand. You just said you gave him the
3 figures?
4

5 A Yes.

6 MR. KELNER: So there's no confusion -- I'm
7 sure you don't want to generate confusion -- The wit-
8 ness said he provided --

9 MR. RUDOFISKY: I'm not interested in Mr. Kelner's
10 interpretation of what the witness said.

11 MR. KELNER: There are a lot of figures here
12 he didn't purport to have prepared. There are figures
13 here not explained to the Court

14 MR. RUDOFISKY: We are quite well aware of that.
15 We'll see when it's transcribed what the witness
16 testified to and we'll know precisely who prepared
17 what.

18 That's all.

19 Q Now, in your experience with MEBCO --

20 A Yes --

21 Q Do I understand your testimony to be that every
22 person who you have wanted to hire as a union apprentice,
23 that has happened without deviation?

24 A Without deviation.

25 Q Is there any lag or leave time between your

1
2 decision and the time they actually become a union apprentice?

3 A Sometimes yes depending on when the board is
4 going to meet and what's happening.

5 Q Can you give us a range based on your
6 experience?

7 A A month or two months. Sometimes right away.
8 I have a boy now I just got in --

9 Q So it could be from immediately to a month
10 or two later?

11 A That's right.

12 Q I take it once you get your foot in the door
13 you are a first year and then a second year when you're
14 there two years --

15 A Once he's in the union, the union sends him
16 to school. He goes to school, works for a company and
17 graduates in steps; first, second, third, and fourth.

18 Q Do you have control over them working for
19 MEBCO though?

20 A Oh, yes.

21 Q Based on your experience -- I take it you are
22 a member of the Union?

23 A No, I cannot be a member of the union.

24 Q You are not a union member?

25 A No.

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2 Q Have you ever been a union member?

3 A No.

4 Q Is it your testimony though that your job
5 requires that you be aware of the union procedures?

6 A Oh, absolutely. This is daily procedures.

7 Q Based on your knowledge and experience as a
8 result of your job, are apprentices required at any time to
9 take tests?

10 A Yes.

11 Q Tell us based on your understanding what
12 kind of tests they have to take?

13 A It's a basic simple test. It's not truly an
14 electrical test. It defines A.C., D.C. current.

15 Q You don't think it's very difficult but does
16 it probe the apprentice's knowledge with respect to being
17 an electrician?

18 A Yes, but anybody who went to junior high school
19 and took a course in junior high school could pass it without
20 any difficulty.

21 Q You've never taken such a test though have you?

22 A No.

23 Q Have you seen the test?

24 A No, I haven't seen it myself. The men tell me
25 what it is. I've never had one of my people fail it.

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Q Now, let's assume that an apprentice progresses through his fifth year.

Tell us base on your understanding what are the steps that are necessary to become a journeyman A mechanic?

A He must go to school for four years.

Q During the five-year apprenticeship?

A Yes. He goes two nights a week for a certain amount -- seven months.

Q That's seven months a year?

A Yes. I think the school closes in the summer. He takes his annual test and gets his upgrading in the union, one, two, three, four.

When he gets to the fifth year it's a pre-journeyman card which is a rate of like six dollars and change.

Q Is that the 17,000 reflected on this chart?

A Yes, that would be the 17,000.

Now, after that he works one year in this MIJ division. I don't know what you would call it. It's in between. It's a fourth and fifth year. He doesn't go to school. He's passed all his tests. He goes one year and works as a pre-mechanic and after that year he's given his A journeyman's card.

Q Automatically?

A Yes, unless he does something -- unless he gets

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involved in a problem. If he's thrown in jail or something that's another story.

Q Are you aware of anything else besides being thrown in jail that would prevent one from becoming a journeyman A mechanic?

A No. I don't know of any men who have refused cards.

Q Does the union have unlimited numbers of journeyman A mechanics?

A They have got 14,000 I think.

Q Is that a static figure or is it constantly expanding?

A I would say it's expanding. Local 3 is expanding.

Q Do you know that for a fact?

A Yes because Local 3 is taking in different locals and non-union shops at this time.

Q What would the take-home pay of an apprentice in 1973 be?

MR. KELNER: That's objected to. The decisions have held that the gross pay is the base for assessment of damages. We've briefed that.

MR. RUDOFISKY: I'll rephrase it. I wasn't focusing on the income tax aspects of it.

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Q What would the gross pay be?

A What would his gross pay be?

Q Yes.

A 84.90 -- that's in '73?

Q That's the gross earnings?

A That would be his total earnings. What he takes home I don't know.

Q I didn't mean what his deductions are or anything of that nature.

You are including in the 84.90 --

A The benefits.

Q You are including for example the employer's contribution to social security, right?

A Right. We pay it. That's what it costs us.

Q Now, would your percentage figure for benefits hold true with respect to the journeyman A mechanic?

A Yes.

Q Do you have a copy of the contract, the Local 3 contract upon which these figures were prepared with you?

A No, I do not.

Q When was the last time you read that contract?

A Two weeks, three weeks ago before I got sick.

Excuse me, can I clarify something?

Q Sure.

1 A As far as reading the contract. I don't read
2 the contract. I just take the rates off as far as what we
3 are paying people. I don't get into the techicality of
4 reading the contract.
5

6 Q Your job doesn't require you to read that?

7 A No. We have a shop steward that does negotiation
8 if we have problems between the company and the men.

9 Q Now, at the present how many apprentices and
10 journeyman A mechanics do you have working for you?

11 A It must be 40-some men. That's in that
12 division but there are other divisions of electricians;
13 M and DMS.

14 Q Now, with respect to your division, men who
15 have been working for you since you became vice-president
16 in 1974 approximately -- so you have been vice-president
17 for something more than two years; is that correct?

18 A Correct.

19 Q Has the number of men working for you remained
20 fairly constant at any one time?

21 A It fluctuates depending on construction.

22 Q Could you give us an idea of the range of the
23 numbers of men who have worked for you? What's the least number
24 of men you had working for you since 1974?

25 A 40-some men. We keep a constant. When we need

2 additional men we call the hall and they send us additional
3 men.

4 In other words, our constant men working for us all
5 have of the time. We need additional men, we call the union
6 and then they send them.

7 Q Have any of the men working for you since
8 1974 as apprentices left the company?

9 A Yes.

10 Q Do you have any statistics for the Court that
11 you can share with us as far as the turnover rate of men
12 in your division?

13 A As turnover rate? .

14 Q How many men joined your company as first-year
15 apprentices and go through to journeyman A mechanics?

16 A Oh, God. I don't really know how many men
17 we put through. You have to remember when the union sends
18 us helpers and mechanics they may work for a summer, a job or
19 two months. As I say we try to keep our own key people and
20 work off of that basis.

21 Q In your experience have there been people
22 starting with the company as first-year apprentices but
23 didn't go all the way through for whatever reason?

24 A Yes.

25 Q Within your experience have there been men --

2 withdrawn -- has it been your experience that you uniformly
3 attempt to hire men of high potential?

4 A We try.

5 Q And has it been your experience that some of
6 those men just don't work out?

7 A Well, don't work out -- yes, but for reasons
8 like they want to go to college and they work as apprentices
9 and go to college and just get out of the electrical field
10 entirely.

11 Q Would you have any idea how many since 1974 --
12 when you give me your answer in terms of your experience what
13 year are you going from -- 1970 or 1974?

14 A What are you asking me?

15 Q I understand you began with MEBCO in approxi-
16 mately 1970?

17 A Right.

18 Q In what position did you start with MEBCO?

19 A Supervisor.

20 Q Can you tell us out of this group that you've
21 just referred to, people who started with the company as
22 first-year apprentices but for whatever reason the reason you
23 gave or other reasons have left, could you tell us how many
24 there have been?

25 A How many? The guys that I recommended are

1 still there.

2
3 Q I'm not limiting it to the people you
4 recommended?

5 A But there are other helpers that have come and
6 gone, yes. The number I could never say because I don't
7 know.

8 You have to realize when you run a job with 20-some
9 men and seven of them are helpers that these helpers may
10 come and go throughout the union as helpers. These are hands
11 on a job to do construction.

12 Q I understand that. We are trying to talk
13 about people with high potential coming into the company as
14 first-year apprentices?

15 A Most of the men are still there.

16 Q But not all --

17 MR. KELNER: Your Honor, they could leave the
18 company and work for another company. He has no
19 knowledge or control of all of the exact figures.

20 THE COURT: All right.

21 MR. RUDOPSKY: All I can say Judge that the
22 whole area is speculative.

23 THE COURT: Future earnings are always specu-
24 lative. The marginal gross isn't speculative. If
25 you consider the cost of living increases. Even

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Congress recognizes that. Whether or not it's going to be around for another two years only God can tell and I don't intend to take his place.

MR. RUDOFISKY: I have no further question, Judge.

THE COURT: We'll take a recess.

(after recess)

LAWRENCE RITTER, called as a witness having been first duly sworn by the Clerk of the court testified as follows:

DIRECT EXAMINATION

BY MR. KELNER:

Q Sir, are you customarily identified as Dr. Ritter or Professor Ritter?

A Either one sir.

Q Well, Dr. Ritter, what's your business or occupation?

A I am a professor of economics and finance at New York University.

Q For how long have you been a professor of economics and finance at New York University?

A Since 1960.

Q Sir, have you held any particular positions with the University?

15 1
2 A I'm the chairman of the Department of
3 Finance at the Graduate School of Business.

4 Q Over how many years have you been chairman
5 of the Finance Department -- that's the Graduate School of
6 Business at New York University; is that correct?

7 A Yes.

8 Q For how many years?

9 A I was chairman from 1962 to 1969 and from
10 1973 to now.

11 Q Are you also teaching sir?

12 A Yes, I do.

13 Q Tell us just briefly and generally what's
14 your field of activity and the subject matter which you do
15 teach on the faculty at New York University?

16 A I teach the area of money and banking, and
17 financial markets.

18 Q And in connection with that sir, have you ever
19 been in the banking field before you became connected with the
20 faculty of New York University?

21 A I was employed at the Federal Reserve Bank of
22 New York from 1955 until 1960.

23 Q In what capacity?

24 A I was first an economist and then chief of
25 domestic research division.

1
2 Q That's at the Federal Reserve Bank --

3 A Federal Reserve Bank of New York.

4 Q Briefly tell the Court your field of activity
5 or specialty in your work with the Federal Reserve Bank?

6 A I was concerned mainly with the determination
7 of trends in the money supply, prices, employment, gross na-
8 tional product, business conditions and the like.

9 Q Did that involve an analysis of the trends
10 of interest bearing capacity of investment of funds?

11 A Yes, it did.

12 Q Did it involve consideration of the trends
13 of inflation and consideration of the factors that go into
14 the inflationary rates that we have been experiencing in this
15 country and in the world?

16 A Yes.

17 Q From where were you graduated, sir?

18 A I got an undergraduate degree at
19 Indiana University in 1943 and a Ph.d. from the University
20 of Wisconsin in 1951.

21 Q And in what field of study did you specialize
22 when you did attend college?

23 A The Ph. d. degree was in the field of Economics.

24 Q So basically sir, is it a fact that your
25 specialization has been in the field of Economics and the

17 1 various things we have been talking about?

2 A That's correct.

3 Q Have you been the author of any particular
4 publications in this general field?

5 A Yes.

6 Q Tell us a little about it?

7 A One book is called "Money" and it's published
8 by Basic Books and that's now in its third edition and the other
9 one is called "Principles of Money Banking and Financial
10 Markets," also published by Basic Books and now in its
11 second edition.

12 Q Have you been the author of other articles
13 and treatises?

14 A Yes. In professional journals.

15 Q Have you summarized for me the various articles
16 you have written?

17 A I did.

18 Q And does this list contain perhaps over 40
19 articles on the subject of money banking and various other
20 subject matter?

21 A Something like that yes.

22 Q All related to the matters we have just
23 mentioned?

24 A Yes.

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Q For instance, I notice here there is an article entitled, "The Control of Inflation, Direct Versus Monetary Fiscal Measures," published by the Journal of General Finance?

A Yes. That's an abstract of a Ph. d thesis.

Q Another one, "The Interest Rate War," published by Challenge Magazine, 1966. Did that deal with the interest trends and their rise and fall?

A Yes.

Q I ask you sir, whether your field of specialization has included a consideration of the factors that go into the variations or fluctuations of interest rates and trends?

A Yes. That's true.

Q Sir, at my request, did you make any analysis of various figures and amounts of money related to testimony of the previous witness whose testimony you did hear this morning?

A Yes, I did.

Q And sir, I'm going to ask you -- withdrawn -- did you hear the witness testify to the various annual salary income for the years 1973 through 1977 for apprentice electricians -- union apprentice electricians in the City of New York under Local 3 contracts with the electrical

1
2 industry?

3 A Yes.

4 Q Were you supplied with these figures before you
5 came to court this morning by myself?

6 A I was.

7 Q And were you the person who actually in your
8 own handwriting prepared this document to facilitate the
9 presentation of these facts and hopefully to facilitate the
10 Court following the various figures that we have been
11 discussing?

12 A Yes.

13 MR. KELNER: If your Honor please, I would like
14 to offer in evidence the original document that you
15 have there so that it may be used by you at any time
16 that your Honor may deem fit hereafter to consult
17 some of these figures.

18 MR. RUDOPSKY: I realize on the basis of your
19 prior comments that you may well take it in evidence
20 but reserve the right for yourself to give it weight.

21 I'd like to say we object most strenuously
22 to this. Forgetting contract, this is just an
23 improper method of coming up with a summary. They
24 catch us between two people. These
25 professors don't know if the underlying

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figures are right, wrong, or otherwise.

The other fellow doesn't know whether the computation are right or wrong. He's testifying as to the figures and they catch us between the two ends and there is no way to turn.

I think it's an improper method to getting these figures into evidence.

THE COURT: The weight to be given will be up to me.

MR. RUDOLFSKY: For the record, we object.

THE COURT: The weight I have it will be constant with what I think is proper under the circumstances and nothing more than that.

MR. KELNER: May We have it marked your Honor?

THE COURT: Yes.

MR. KELNER: I have copies. May we mark the original and return it to you sir. I think you have the original.

THE COURT: It's in here somewhere. I don't have it out.

THE CLERK: Exhibit 10 marked in evidence.

(so marked)

DIRECT EXAMINATION

BY MR. KELNER (Cont'd):

Q Now, Dr. Ritter, I ask you to assume that this court has before it a question or problem of evaluation of future loss of earnings and future expenses that may be condensed into one lump sum, assuming that the court were to award damages to the plaintiff in this case, is that clear to you?

A Yes.

Q I am not trying to presuppose what this court will do, but assuming there was an award rendered in behalf of the plaintiff, my questions are going to be directed toward determining what is a fair evaluation at present values, or present dollar determination for future losses. Is that clear what our problem is?

A Yes.

Q All right. Sir, now, in determining -- withdrawn.

If one were to make an award at the present time for future earnings that one, say Robert Lennon were going to earn for the next 40 years and place the entire fund of money in one lump sum of money in his hands that funds would have an interest earning power capacity, is that right?

A Yes.

Q That would be in effect unjustly enriching

any one if one would give him that total sum where he would have to work for 40 years since it had that interest earning capacity. Is that clear between you and me?

A Yes.

Q And so, is there a procedure which you followed to determine the present value of that future fund that would have taken 40 years to earn?

A Yes.

Q Now, could you explain to us what that factor is? What is it called to economize?

A Discounting the present value.

Q Is that what it is called or labeled by those who are in the field of economics?

A Correct.

Q But is that the only factor that would be presented in relation to consideration of the future earnings that Mr. Lennon might be deriving from say 40 years of effort?

MR. RUDOLPH: I object to that. That is clearly a question for the court and not the witness.

MR. KEINER: I would like to press for an answer so that your Honor knows what I am talking about and then your Honor can evaluate it anyway you like.

MR. RUDOLPH: Let him testify to the facts and what he thinks the inflation rates --

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THE COURT: If he has an idea, let him give it.

BY MR. KELNER (Cont'd):

Q What are the factors that must be used based upon the economics of getting a present fund for future earnings, what are the factors involved in determining that on a fair evaluation basis?

A One is the interest earning power of money and for that reason we have to discount the present value to take that into account and the second element is, the likelihood of inflation which depreciates the value of money and that should also be taken into account.

MR. RUDOFKY: I move to strike the last part of the answer as a question for the court. If he wants to testify as to what inflation is going to be and your Honor wants to take it that is one thing, but the ultimate question is for the court.

MR. KELNER: Of course, that is also presupposed that everything is for the court's determination. We don't quarrel with that.

THE COURT: The balance --

MR. RUDOFKY: I think we can do this precisely. Mr. Kelner knows what he's looking for. The witness is a professional and the court knows how to evaluate it, and I say let's just get the facts.

MR. KELNER: That is what I propose to do, your

Honor.

THE COURT: Proceed.

BY MR. KELNER (Cont'd):

Q Can we take the interest earning power or capacity of money? Sir, based upon your knowledge, your experience and your research for the Federal Reserve Bank and with all the studies that you have had during all the years of your practice in the field of banking and in the field of economics, historically, going back say 40 years, just tell the court briefly what has been the interest earning capacity of money? Tell us a little bit about the trends that are presently in effect and the trends that you have experienced, that the country has experienced say over the past 40 years?

A Well, we are talking about interest rates?

Q Yes.

A Which is the interest money accumulates because interest rates exist, and over the past 35 or 40 years, it depends on what interest rates we are looking for. There are numerous interest rates, there are interest rates on investments like the interest that one can earn in a savings bank, in a commercial bank or savings bank, there are interest rates on savings bonds, series E bonds, interest rates on corporate securities, government securities, municipal securities. By

1
2 and large interest rates throughout all these areas were very
3 low during the 1930s. They rose slightly in the 1940s and the
4 1950s.

5 In the middle 1960s, they went up considerably
6 than they receded and then they went up in the last period of
7 tight money, 1973 and '74, and since then they have again
8 receded, and to put some numbers on this, savings accounts and
9 commercial banks during the depression earned about two percent,
10 one and a half or two percent interest.

11 During the 1950s, savings accounts and commercial
12 banks earned interest of about three or four percent. And
13 currently, a savings account and commercial bank can get
14 interest anywhere from five and a half and seven and three
15 quarters.

16 Q Now, those, are those day to day or month to
17 month deposits or do you have to tie the money up for two years,
18 three years or five years to get higher than five percent or
19 five and a quarter percent?

20 A You can get five percent, five and a half percent
21 on a passbook account and seven and three quarters percent or
22 seven and a half percent on a six or seven year savings account,
23 savings certificate.

24 Q If you have the money in hand today?

25 A Yes, sir.

Ritter-direct

Q Sir, I am only talking about safe investment accounts for a person who is handicapped, assuming a person like Bob Lennon is handicapped and lost a leg, I am only referring to in all our discussions in safe safety interest bearing returns. What is the field that is regarded as safety investment for a person such as a handicapped person?

MR. RUDOFCKY: I object. There is no showing that the witness is competent to answer that question, absolutely none. He testified he knows about inflation rates and that is what he teaches, money and banking. He doesn't know about safe investments, unless there is something else that has to come out.

THE COURT: I don't know what type of investments he is going to speak of, but there are even within the knowledge of the court, a bank is safe.

MR. RUDOFCKY: I am not suggesting a bank isn't safe --

THE COURT: Let me find out. If it is not responsive to his knowledge, I will strike it.

MR. RUDOFCKY: Can we ask him what about his background qualifies him to answer these questions?

MR. KELNER: I will ask him.

BY MR. KELNER (Cont'd):

Q Are you familiar based on your background,

1
2 experience and research and your actual working in the banking
3 field and various researches you have done, are you familiar
7 4 with what is generally acceptable in the field of economics
5 and banking as a safe investment for a handicapped person?

6 A safe investments for anyone, handicapped or not.

7 Q would be what?

8 A There are only two I can think of, one is a
9 savings account in a savings or commercial bank and the other
10 is government savings bond.

11 MR. RUDOFCKY: Again, your Honor, I think that
12 answer ought to be stricken, perhaps it will be
13 admissible later on, but I still don't think we have
14 heard what makes the witness competent to tell us that.
15 All I've heard so far is that he is some sort of an
16 expert in the field of inflation.

17 THE COURT: All right. Ask him his experience.

18 Q Have you had experience with the banks in any
19 aspect of your activities that would qualify you or give you
20 special experience or exposure to consideration what constitutes
21 a safe investment of money?

22 A Yes. I should think teaching money courses in
23 money markets and finance in general would qualify one. It is
24 not a very difficult question. That is ultra safe investments
25 isn't difficult. The difficulties come in from when you talk

1
2 risky investments. Safe investments I don't think you need
3 much background to know that savings accounts in banks and
4 savings bonds is about it.

5 MR. RUDOPSKY: Again, your Honor, I just don't
6 understand why we have to try to put this on the record.
7 I would like a ruling from the court. Does this man's
8 experience as a professor with respect to money and
9 banking and he has testified that he is an expert in
10 inflation, does that ipso facto give rise to a
11 presumption he is an investment adviser?

12 THE COURT: My only response to you is this.
13 The Court itself should take judicial notice of the fact
14 that savings accounts and savings banks are the only
15 investments that the Court can make, only because the
16 Government feels it is safe and also when I was in the
17 State Court the State Court feels it was safe. I don't
18 understand at this point your objection. Even if I
19 were to take judicial notice of it, judicial notice so far
20 as I'm concerned that a savings account is the safest
21 place to put your money in.

22 MR. RUDOPSKY: My response is two-fold. Number
23 one, if the Court is advising me that it intends to
24 take judicial notice?

25 THE COURT: I will take judicial notice.

1
2 MR. RUDOFCKY: Not that -- well that those are
3 the only two safe investments?

4 THE COURT: No, I take judicial notice that
5 a savings account is safe for investments and U.S.
6 Government bonds are a safe investment. Whether he
7 tells us that or not and if he has any others he can
8 tell us about.

9 MR. RUDOFCKY: He apparently is in the process
10 of telling us that in his opinion those are the only
11 safe investments.

12 THE COURT: He didn't say that. I didn't gather
13 it that way.

14 MR. KELNER: That is not our intention, Your Honor.

15 THE COURT: Let's find out what he has to say.

16 BY MR. KELNER (Cont'd):

17 Q Are there some other safe investments equivalent
18 to savings bank interest and government bonds?

19 A Only commercial bank savings accounts.

20 Q Are all of those bank accounts whether commercial
21 or savings bank accounts, all insured by the F.D.I.C., a
22 government agency?

23 A Yes, or a savings account in a savings and loan
24 association which is also insured.

25 MR. KELNER: I think the Court is taking judicial

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notice and I think that is obvious. May I proceed,
your Honor?

THE COURT: Yes.

Q You have told us that going back to depression years, interest ran from one and a half to two percent and then you have told us about the current interest rate. Can you project to the Court a reasonable future anticipation or projection of what the average annual interest return would be on a lump sum of money invested let's say this year or at the present time, based on the historical average and trends as you know them to be?

A I could give a personal judgment based upon historical trends as to what is likely with respect to interest rates on safe investments in the future, yes.

Q Tell us what that is in your opinion based upon your field of expertise and your knowledge?

A I would think that six percent is a conservative figure for interest rates on very safe investments over the future.

Q Now, if this Court on the basis of evidence were, and I don't want to presuppose anything, if it were hypothetically to render a verdict or decision in favor of Mr. Lennon at this point, would the Court in consideration of the present value of the factor of six percent discounted in order to

Ritter-direct.

1
2 determine the present value of the future fund, is that what
11 3 you're telling us in effect?

4 A Yes.

5 Q Sir, at my request in preparing this exhibit --
6 what number was that again?

7 THE COURT: 10.

8 Q Exhibit 10, did you prepare a year by year
9 present value discounted at the rate of six percent for the
10 years commencing 1978 on the assumption that a journeyman,
11 mechanic would be earning starting that year \$34,110?

12 A Yes, I did.

13 Q The past earnings, sir, assuming that Mr. Lennon
14 would have earned the various amounts in the first five years
15 as an apprentice electrician and starting 1973 through 1977,
16 would that on this basis be the subject of discounting?

17 A No, that is the past.

18 Q In other words, anything that has already passed
19 or lost wouldn't be requiring a discount as a future sum of
20 money that would be earned in the future, is that what you're
21 saying?

22 A Yes.

23 Q Now, have I asked you to discount these future
24 annual earnings on the basis of \$34,110. and what have you done
25 in consideration of that factor?

12

1
2 A I have assumed on the basis of it for -- from
3 Mr. Farrell that a journeyman, a mechanic in the year 1978
4 would make \$34,110.

5 Q And if he were to receive that money in 1977
6 but would have to work through 1978 to earn it, for how long
7 a period of time would you then be discounting it at 10 percent?

8 A I discount everything to 1977, all of these
9 figures and I took the 1979 and 1980 throughout assuming
10 a figure of \$34,110. a year and discounted it and each figure
11 at six percent back to the year 1977. Therefore, the first
12 two columns in this exhibit, the first column is the \$34,110.,
13 assumed salary, to age 65, and the second column is the
14 present value of each of those numbers discounted to the present
15 which is 1977 at six percent a year.

16 Q So if I were to pick out at random the amount of
17 \$34,110. and assume he would earn that 20 years from now, 1997,
18 that sum given to him today would only be \$10,636., under your
19 tables; is that correct?

20 A Yes. Because at six percent interest that
21 \$10,636. would grow to \$34,110. in 20 years.

22 Q Now, you have projected this over a period of
23 40 years up to his social security retirement age of 65?

24 A That's correct.

25 Q By discounting, looking at page two of this

1
2 exhibit, what was the total amount of money that the discounted
13 3 value would be if he had in hand today, not for injuries but
4 just for loss of earnings?

5 A The discounted value would be \$509,913., that
6 doesn't count the \$63,000. past.

7 Q That is from the last five years from 1973 to
8 1978?

9 A That's correct.

10 Q If you were to add that \$63,890. for the last
11 five years of earnings, if he had earned that much based upon
12 the testimony of Mr. Farrell, I know your total came to
13 \$573,803.; is that correct?

14 A That's correct.

15 Q Sir, I know that you stayed with the sum of
16 \$34,110. through a period of 40 years, but do you recall
17 Mr. Farrell testifying that there has been on average a nine
18 percent annual increase in earnings the past number of years
19 so that that has been the trend. Did you hear him testify
20 to that effect?

21 A Yes.

22 Q I noticed you didn't take that into consideration;
23 is that correct?

24 A That's correct.

25 Q Are you then assuming with these figures that

14

1 Mr. Lennon will be frozen for the next 40 years at what the
2 current annual earnings are for a journeyman, an electrician?
3

4 A I did in the first two columns, yes, I assumed
5 his salary froze in the first two columns.

6 Q Do you know what the Bureau of Labor statistics
7 is?

8 A Yes.

9 Q Because historically, if you know, what has been
10 the actual trend of wages and prices in the last 40 years?

11 A Wages and prices have risen marketedly in the
12 past 40 years. They are now four times about what they were
13 in the mid '30s.

14 Q Based -- withdrawn.

15 Q Sir, this very year and last year and the last
16 five years, tell us what has been happening with regard to the
17 trends in wages and prices based on government statistics?

18 A They tend to move closely together so you can
19 talk about prices or wages, although for a year or two there
20 will be a convergence, generally they come back to line again,
21 but in the past five years prices have gone up seven percent
22 per annum, on average, because in 1974 they went up 11 or 12
23 percent. In 1975 they went up nine or 10 percent and last
24 year, 1976, they went up 4.9 to five and a half percent
25 depending on how you want to calculate it. But on the average

1
2 over the last 10 years prices have gone up six percent, over
15 3 the past five years they have gone up seven percent and over
4 the past three years they have gone up about eight percent
5 per annum.

6 Q Is this tied in in any way on what is happening
7 on a worldwide basis, things that one reads about Italy and
8 England, is our own inflation geared to that or tied to that?

9 MR. RUDOFKY: I am sure the answer is very
10 interesting, but I don't know what relevance it has.

11 MR. KELNER: I will withdraw it.

12 Q Sir, do you have an opinion based upon your study
13 of these trends, your analysis of the inflationary trends that
14 you can project to this court as to what the expected conserva-
15 tive low inflationary rate is likely to be with reasonable
16 certainty in the years to come?

17 A Economies differ very substantially on this
18 matter. By and large I think a conservative projection for the
19 foreseeable future of inflation is somewhere between five and
20 seven percent per annum and I think that is very conservative
21 and I would settle mid-point between five and seven, at six
22 percent graded inflation.

23 Q Is that six percent a hoped for an optimistic
24 projection of our future inflationary rates?

25 A As a conservative statement it is.

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Q If your optimism is not fulfilled by the events that will take place then the inflation rate would even be higher than six percent?

A It is quite within the realm of probability that it could be between eight and 12 percent.

Q If this Court were to accept the conservative low inflationary rate then the effect of that on the say \$34,110. annual income of a journeyman, a mechanic, what would the effect of that inflationary rate be?

A It would erode the purchasing power of that income by six percent a year if we have a six percent rate of inflation.

Q If you gave a man \$34,110. and if this six percent inflationary trend were to continue, what would be the actual purchasing power of that \$34,000. figure say 10 or 20 or 40 years from now?

A It would go down six percent a year.

Q Have you tried to translate that into some understandable way on this document, Plaintiff's Exhibit 10, so the Court may to whatever value it wants to place on it the future effects on the purchasing effects of the dollar?

A I did it by taking the six percent figure of inflation and translated it to six percent increase on wages in order to keep constant purchasing power.

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2 Q How did you tabulate that in Plaintiff's
17 Exhibit 10?

3
4 A The last two columns, the next to last column
5 shows what would happen to that \$34,110. figure if it went up
6 by six percent a year, because of inflation and then the
7 discounted value of that because the discounting works in
8 opposite directions breaks it right back to \$34,110.

9 Q So we can understand you, the columns on the
10 right where you have maintained \$34,110. constant for the next
11 40 years but adding to that six percent per year I note you have
12 gone from \$34,110. to \$36,157. for 1978; is that correct?

13 A That is six percent increase.

14 Q And thereafter it has progressed to the point
15 where you had a total sum of \$5,244,811. carried out to a 40
16 year period?

17 A That is the sum total.

18 Q By adding the sum of \$63,890. which hypothetically
19 would be earned during the past five years from '73 to '78,
20 you reach a grand total of \$5,308,701. on that basis; is that
21 correct?

22 A That's correct.

23 Q In order for us to equate the discounting and
24 the inflation these two principle factors you mentioned, where
25 do you end up?

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2 A The final column shows if you take the six
18 3 percent inflation, next to the last column, and then discount
4 that at six percent you wind-up with purchasing power of
5 \$34,110. straight through, and that adds up to a total discounted
6 value of \$1,330,290. Again, that is not taking account of
7 that \$63,890. that is in the past.

8 Q If you balance the discount factor with the
9 inflation factor it is like what is colloquially called a
10 Mexican standoff, you come back to the same figure?

11 A Yes. That is the final figure on the right-hand
12 column is the same as the final figure on the far left-hand
13 column.

14 Q If you're wrong in being too conservative by
15 saying six percent will be the annual inflationary rate, then
16 that figure would be considerably higher depending on where
17 your inflation takes you?

18 A The greater the inflation the higher the figure
19 should be.

20 Q In essence by having balanced the inflation
21 against the interest earning capacity of the money you would
22 have wound up with a total of past and future loss of earnings
23 considering both -- factors of \$1,394,180., discounted at six
24 percent and the inflation factor considered at six percent; is
25 that correct?

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A That's correct. That is why the figure

129 3 \$1,394,130. appears at the bottom on the far left and far right
4 columns.

5

Q There are two factors, one, I ask you to assume

6

there is testimony that some future medical and hospital care

7

expenses will be required by Mr. Lennon in an amount not

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possible to project for the past 40 years but related to his

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injuries. Will you assume that? Regardless of what the amount

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of money would be to cover such care, would that also be subject

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to the same inflationary spiral and also to the same discounting

12

factor?

13

A Same principles would be involved.

14

Q Whatever amounts would be for the Court to

15

determine but same factors would be applicable?

16

A Yes.

17

Q Now with regard to the future assuming this

18

Court were to deem it reasonable to make some allowance for the

19

hiring of an attendant for some number of hours weekly,

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hypothetically, assume there is testimony this man is totally

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disabled and at this point he's not incurring expenses for house-

22

hold attendant, using friends and sisters to do various things,

23

shopping and cooking and cleaning, assume the Court would deem

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it reasonable to make some award, if it grants an award for

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such continuing interest expenses, would that be subject to

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discounting and inflation?

23

A Yes, it would.

4

Q These various statements with regard to interest and inflation, what is the source of your opinions concerning percentages you have talked about?

6

7

A Historical trends, interest rates and consumer prices.

8

9

Q Have you relied on government statistics with regard to these projections and opinions?

10

11

A Interest rates and consumer price index are

12

available from government sources and are government statistics.

13

Q Are the rates, interest earning capacity of money and the inflation percentages, are they in your opinion conservative statements of both of these factors?

15

16

A Yes.

17

Q Are there others who disagree who think the inflation rates would be higher than six percent?

18

19

A Yes.

20

Q Are there any projecting lower annual inflation rates?

21

22

A A little bit lower, some go to four percent.

23

Q Do you regard them as optimistic or acceptable?

24

A I think they are too optimistic.

25

MR. KELNER: One moment, your Honor, I think

I am finished. I have no further questions, your Honor.

THE COURT: Cross?

CROSS-EXAMINATION

BY MR. RUDOLFSKY:

Q How often have you prepared summaries such as that for the Court?

A I think in the past 10 years I have done this five times.

Q It is not your usual business to prepare these things, is it?

A No.

Q How did Mr. Farrell transmit the data to you?

A Through Mr. Deutsch and Mr. Kelner.

Q Did he give it to you directly? I want this precisely.

A I got it from Mr. Kelner and Mr. Deutsch.

Q And they told you it came from Mr. Farrell?

A Yes.

Q Did you ever meet Mr. Farrell before today?

A No.

Q Did you ever speak to him on the phone?

A No.

Q How did Mr. Kelner and Mr. Deutsch give you the information, what form?

Ritter-cross

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A First they gave it to me over the phone and then they showed it to me on a piece of paper but I had it over the phone.

Q Do you have the piece of paper with you?

A Yes.

Q May I see it?

A Yes.

(Continued on next page)

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Q Is your testimony that this is the same information they gave you on the phone?

A That is Journeyman A. No, that is only part of it. Journeyman A from 1970 to 1977.

I don't have the first, second, third, fourth, fifth year apprentice figure with me. They gave it to me in the same way. I didn't bring it with me.

MR. RUDOFSKY: May we have this marked, your Honor?

THE COURT: Sure.

MR. KELNER: No objection.

MR. RUDOFSKY: Government's Exhibit B.

THE CLERK: In evidence?

MR. RUDOFSKY: Yes, in evidence.

THE CLERK: Document marked in evidence as Government's Exhibit B.

Q Is it your understanding -- am I understanding your testimony correctly, that we try to peer into the economic future with some reasonable certainty that we would have to give Mr. Lennon on the basis of the numbers given to you, we would have to give Mr. Lennon today, or in the year 1977, some \$1,330,000 so that he could safely earn \$34,110 a year until he is 65 years of age? Am I getting the right message from this?

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2
3 A You are. I prefer you use \$1,394,00 figure
4 taking account of that other 63. That 34,110 per year for
5 39 years would add up to \$1,330,000.

6 Q What I am saying is, if we gave him \$1,330,000,
7 how much would six per cent interest on that be?

8 MR. KELNER: I think counsel can calculate that.
9 My objection is directed to the fact he is over
10 simplifying this question by ignoring the inflation
11 element et cetera. By asking what is six per cent of
12 \$1,300,000 --

13 MR. RUDOFSKY: I am not overlooking it and I
14 understand their theory. I am not sure it is the law,
15 but we all understand what they are talking about.

16 Q Could you give us some approximation -- I am
17 not looking for it to the penny -- approximately, let's agree
18 what six per cent on a million dollars is.

19 Is it \$60,000?

20 A I think so. I get mixed up with decimal points.

21 Q Six per cent on 330,000 would be approximately
22 \$20,000 a year?

23 A You want six per cent on one year of \$1,330,000?

24 Q Yes.

25 A Ten percent would be \$133,000 so that six per
cent would be \$70,000.

Q Let's use that. I'm not sure that works out but let's use that as an agreed upon figure.

What you are telling us is the first year this fund conservatively invested at six per cent -- which is presently what one could earn -- that that throws off some \$70,000 to Mr. Lennon, is that correct?

A Yes.

Q The principal would not be diminished, is that correct?

A That is correct.

Q The next year and the next year and the year after that it would throw off some \$70,000 to him?

A Yes.

Q Taking into account Mr. Kelner's point, there comes a time, assuming the accuracy of all the figures, that he would have to make more than \$70,000 so over the course of 35 or 40 years your point is it all averages out?

A That is right.

Q At the end, in the year 2016, does he still have \$1,330,000 of principal left?

A No. That is not if the rate of inflation takes place at six per cent. Seventy thousand starts markedly diminishing. If he has to live on it, he doesn't have that.

Q Where have you taken that into account in your

summary?

A That is taken into account by both the inflation the left two columns. The inflation and final column is diminishing by discounting present value down to 34,110. That gives him a final column -- real purchasing power of 34,110 every year.

Q Your testimony takes into account invasion of principal?

A I am not sure what -- it depends on how much he spends out of the amount every year.

Q IF he earned \$70,000 the first year and the Court was to find that he was entitled to 34,000 that that is what he would have earned, he would have conceivably --

A In the first year he would have much more. And the last years he would have much less than --

MR. KELNER: May he finish his answer?

A In the last year you see 34,000. If you took inflation it would require 330,000. As you go beyond --

Q The earlier years balance the later years?

A Yes.

Q Have you taken into account invasion of principal?

A I have no idea. It depends on how much he spends.

Q Could you work out for us with reasonable

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certainty either on the blackboard or on a piece of paper -- could you work out how much he would have available each year assuming a uniform invasion of principal over the -- whatever the 35 years or how many years are represented here?

A I couldn't do it quickly. This takes quite a while to do -- what I did (indicating). Doing it under the assumption of invasion of principal, I could submit a document but I couldn't do it right now.

Q Based on your expertise of interest rates on money in savings accounts, have they continued to rise over the years? Is that a historical trend?

A They have in general and fallen somewhat in the past year.

Q As a matter of fact, on your direct you testified that the interest rate in 1930 was two per cent?

A One and a half or two per cent.

Q Now the safe rate is some six per cent?

A You can get between five and a half and six and seven and a half on a very safe investment. That is on a savings account.

Q Mr. Kelner made the point to his Honor the seven and a half per cent you have to tie up your money?

A A certificate of deposit.

Q For six or seven years?

1
6

2 A Yes.

3 Q But if we are taking into account years 1978
4 through 2016, presumably one could tie up the bulk of that
5 money especially if someone is looking forward to years in
6 the 21st century?

7 A For seven years one could be assured of seven
8 and three quarter per cent today.

9 Q You haven't worked out the numbers assuming one
10 starts earning seven and three quarters today?

11 A No, but the principal would be the same. The
12 larger interest rise the smaller discount value. The larger
13 inflation the higher the discount value.

14 Q What would the present value -- your fourth
15 column, the extreme righthand column -- I take it that is
16 related to the fact you can earn six per cent safely?

17 A It is.

18 Q What would the bottom line number be if you
19 can earn seven and three quarters?

20 A It would be smaller.

21 Q How much smaller over the space of 40 years?

22 A I would have to be making a sheer guess.

23 Q Let me follow that up and based on your under-
24 standing of the historical trend, can you tell us with
25 reasonable certainty if sometime in the next 40 years, if you

7 1 think that the upper limits of a safe investment were raised --

2
3 A It's impossible -- it's very, very difficult
4 to make these projections and my best estimate is that over
5 this time span of safe investment interest yield will
6 average six per cent. But it is possibly temporary. It
7 could go above that and below that.

8 Q We know. You told us that we are not talking
9 about a person who needed all the money today, we are talking
10 about trying to provide for this man over a span of 40 years.
11 We know he can tie up a great deal of this money and that is
12 the whole point. He is not supposed to be using it for a
13 big blast for a year. He is supposed to pay for everything
14 from here on out. Can you tell us if he took that seven and
15 three quarters, that is today, do you think that is going to
16 go over the course of the 40 years?

17 A I don't think it is. The most likely proba-
18 bility, no.

19 Q Do you believe it will run the same or go down?

20 A Temporarily it may go up to eight per cent and
21 temporarily it may go below what it is. But on the average
22 it will stay about six per cent.

23 Q I'm talking about seven and three quarters.

24 A That's right.

25 Q You think --

1 A That is part of it.

2 Q You think the average of seven and three
3 quarters will be six over 40 years?
4

5 A I would stick with six.

6 Q In connection with your work with the Federal
7 Reserve and your professorial position with research, have
8 you done any research in the saving habit of the average
9 American worker or average American or anything in this area?

10 A To some extent. It's not been one of my main
11 fields of specialty.

12 Q If you know, and if you don't tell me that, can
13 you tell us over the last ten or any number of years you want
14 to specify for the Court, how much the -- what percentage of
15 the average worker's salary has been saved?

16 A I can't answer that.

17 MR. KELNER: I suggest that this is irrelevant.
18 Some people are spendthrifts and some may be misers.

19 THE COURT: The only thing he is trying to do
20 is show the maximum that can be saved and the minimum.
21 Is that what you are trying to do?

22 MR. RUDOFSKY: No.

23 THE COURT: You're trying to get an average of
24 what people usually do?

25 MR. RUDOFSKY: I don't know if this witness is

1
2 familiar with them, I think there are statistics that
3 indicate what percentage --

4 THE COURT: I would say that would be the
5 personality of the person who intends to save.

6 MR. RUDOFSKY: We are talking about the generaliz-
7 ing and what most people earn --

8 THE COURT: I don't think he is in a position,
9 in the type work he does, to advise the Court by
10 testimony as to percentages or otherwise the average
11 American citizens savings.

12 MR. RUDOFSKY: Fine.

13 THE COURT: I know that many infants when they
14 became 18 years old who have \$70,000 , by 19 they have
15 about \$2,000. I probably have greater experience in
16 that than he does, with all due respect to the witness.
17 There is no greater experience than being a Judge for
18 20 years. I have heard everything like a priest and
19 seen everythig like a warden of a prison and I have
20 heard everything like the lawyers.

21 I would say it's a kind of rounded out. But I
22 understand what you are doing.

23 MR. RUDOFSKY: May I see Dr. Ritter's resume for
24 a moment? I haven't seen it before. I would like a
25 minute to look at it before I continue.

1
2 THE COURT: Surely.

3 (Pause.)

4 THE COURT: IN coming to my conclusion I assume
5 you will permit the use of the mortality table and
6 disability table?

7 MR. KELNER: Before I rest I will show the
8 Government Bureau of --

9 THE COURT: You can ask me to take judicial
10 notice of it.

11 MR. KELNER: YOU are talking about the life
12 expectancy?

13 THE COURT: And disability tables.

14 MR. KELNER: I have the life expectancy tables.
15 As far as disability tables, I don't know what you are
16 referring to.

17 THE COURT: I think there is one that shows --
18 well, I will find it.

19 MR. KELNER: All right.

20 While counsel is looking at this, may I offer it
21 in evidence? It is a resume of the articles he's
22 written indicating his expertise and background. I
23 didn't want to take the time of the Court to go through
24 it but your Honor can peruse it.

25 THE COURT: If he has no objection.

1
2 MR. RUDOFSKY: I have no objection Judge.

3 THE COURT: All right.

4 MR. RUDOFSKY: On the representation where the
5 witness asked he would testify everything in it is
6 accurate.

7 THE WITNESS: Yes.

8 MR. KELNER: May I ask? Is everything in the
9 resume accurate?

10 THE WITNESS: Yes, it is.

11 MR. KELNER: I would offer it in evidence.

12 THE CLERK: Resume marked in evidence as
13 Plaintiff's Exhibit 11.

14 Q My only question would be to Dr. Ritter, does
15 that resume fairly reflect the scope of your activities?

16 A Yes. I did not do it for this appearance.

17 Q Is there anything you've done of any signifi-
18 cance in the field of economics that is not on that resume?

19 A No.

20 MR. RUDOFSKY: I have no further questions.

21 MR. KELNER: No further questions.

22 THE COURT: You may step down.

23 MR. KELNER: Off the record.

24 (Off the record discussion held.)

25 THE COURT: Tomorrow 10:00 o'clock.

(Adjournment taken at this time until March 16,

1977 at 10:00 a.m.)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT A. LENNON, :
Plaintiff, : 76-C-396
-against- :
UNITED STATES OF AMERICA, :
Defendant. :

United States Courthouse
Brooklyn, New York
March 16, 1977
10:30 o'clock A.M.

Before :
HONORABLE MARK A. COSTANTINO, U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER



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Appearances:

JOSEPH KEMNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

THE CLERK: Lennon against the United States of America.

MR. RUDOFISKY: Both sides ready, your Honor.

At this time, the Government calls Dr. Thomas Neviasser.

THOMAS JAY NEVIASSER, a witness called on behalf of the United States of America, was sworn by the Clerk of the Court and testified as follows:

DIRECT EXAMINATION

BY MR. RUDOFISKY:

Q Dr. Neviasser, are you a medical doctor?

A Yes, sir.

Q Are you licensed to practice medicine in any state in the United States?

A Several.

Q What states are you licensed to practice medicine, Dr. Neviasser?

A New York, Maryland, Virginia, Florida and District of Columbia.

Q I take it you graduated from college and medical school and had the usual training; would you tell the Court, for the record, the schools that you attended and insofar as you can recall the years?

A Undergraduate school at the University of Pennsylvania

1 from 1958 to 1962.

2 George Washington University Medical School,
3 1962 to 1966.

4 Internship at the University of Pennsylvania
5 Hospital from '66 to '67.

6 General surgery residency, University of
7 Pennsylvania Hospital from '67 to '68.

8 Orthopedic residency training, Columbia
9 Presbyterian Medical Center, New York Orthopedic Hospital,
10 1968 to 1971.

11 Lieutenant commander in the United States Navy
12 from 1971 to 1973, St. Albans Naval Hospital in orthopedic
13 surgery and assistant chief of orthopedic surgery at the
14 St. Albans Naval Hospital from '72 to '73.

15 Q After your tour of duty with the navy,
16 did you go to private practice?

17 A Yes, sir.

18 Q Have you been in private practice ever since?

19 A Yes.

20 Q Where?

21 A In Vienna, Virginia.

22 Q What is the nature of your practice?

23 A Orthopedic surgery.

24 Q Are you associated or do you have privileges at
25

any hospitals?

436

A Yes.

Q What hospitals?

A George Washington University Hospital, Fairfax Hospital and Commonwealth Doctor's Hospital, and Washington Hospital Center.

Q Doctor, do you belong to any professional organizations, and if so, would you tell us what they are?

A I am a diplomate of the American Academy of Orthopedic Surgeons; member of the Medical Society of District of Columbia, and Fairfax County in Virginia.

Q Doctor, during your tour of duty at the St. Albans Naval Hospital, do you recall a patient by the name of Robert Lennon?

A Yes, sir.

Q Do you recognize Mr. Lennon in the courtroom today?

A Yes, sir.

Q Have you spoken to him before you came here?

A Yes.

Q Can you describe for the Court approximately when you first Mr. Lennon and what the circumstances were?

A I believe it was the end of June, 1972, several days after he had had surgery for an open fracture of his right

tibia, which was operated on by other physicians.

When the physician's tour of duty was over at St. Albans I took over the case.

Q So you did not perform the initial surgery?

A No, sir.

Q I would like to direct your attention to plaintiff's exhibit number 1 in evidence, which you have before you.

Would you tell us what you understand plaintiff's exhibit 1 to be?

A It is the record of that admission of his open fracture of his tibia.

He was admitted June 10, 1972.

Q I would like to direct your attention to the portion of plaintiff's exhibit 1 which is entitled, "Doctor's orders" -- excuse me, "Doctor's progress notes," and I would like -- I believe it's page 27 of that record if you can make out the page numbers.

A Yes, sir.

Q Is that the first note that you wrote on this case as far as you can ascertain?

A Yes, that is June 29th.

Q I would like you to begin, actually begin, with the note of July 5, 1972; to the best of your recollection,

can you tell us what the patient's situation was?

Can you tell us what the circumstances were from a medical standpoint at the time that you wrote that note?

A He is still an in-patient in the hospital. Area of skin slough was noted over four to five centimeters area and one or two centimeters wide.

This was not previously noted in the chart.

Beginning with July 5th, this area had -- was demarcating, which meant that the skin slough was stopping.

I stated I will debride it in the near future.

Q Could you tell us where this area of skin slough was to the best of your recollection with respect to the site of the fracture?

A Yes. It was above the fracture area, definitely above.

Q When you say above --

A Up towards the knee.

Q You mean over the fracture?

A No. Up towards the knee at the upper end of the initial incision.

Q What was the status of the fracture and the fracture site at this time?

A It was being held with what we call a Lottes nail, and the fracture was not evidenced whatsoever in the wound.

1
2 The opening was higher up, towards the knee,
3 that is.

4 Q Do you have any recollection as to whether --
5 withdrawn.

6 To the best of your understanding, with regard
7 to the medical aspect of the case, at the time the initial
8 surgery had been done, had the fracture site been exposed
9 through an incision?

10 A Yes, sir.

11 Q Are you now telling us that portions of the
12 incision had closed up?

13 A Yes.

14 Q At the time we are talking about in these notes?

15 A Yes.

16 Q Okay.

17 Let's move on to the note of July 6, 1972.

18 Would you tell us what you saw on that day?

19 A The dead skin was just removed from the wound
20 and the small pus pockets evacuated, and medially through
21 the wound -- that means more to the front of the leg -- and
22 medially more to the inside, so we are getting away from the
23 initial wound itself. An acidic acid dressing was then started.

24 Q Do you have any recollection where the pus pocket
25 was with respect to the underlying bone?

A It was in the bone. Underneath the skin,
just underneath the skin.

Q Is there a name for the layer?

A Subcutaneous.

Q Is that the first layer under the top?

A Essentially it is what we call -- you call it
fatty tissue underneath the skin.

Q We previously heard an opinion testified to at
this trial that this was a deep abscess. Can you tell us as
a factual matter, to the best of your recollection, whether
this was a deep abscess?

A I wouldn't consider it a deep abscess, no.

Q Now, did you do anything else, to the best of
your recollection, in connection with this July 6th treatment?

A Yes, we cleaned off the skin. There was some
mucous material which was cultured and we applied the soak
locally to this area.

Q Now, I would like not so much as a doctor but
in layman language to characterize this report, was this a
serious situation? Was it a relatively unimportant situation?
Or is there any other kind of characterization you want to
put on it?

Was this a real problem or the ordinary sort
of thing? What was going on here?

1
2 A The initial evaluation of the wound, I don't
3 believe to be a major problem.

4 The skin was devasculazad.

5 Q What does that mean.

6 A It means no blood supply. That could have
7 occurred during the accident and as a result of the surgery
8 and swelling of the wound. The blood supply to the area could
9 be cut off.

10 That often happens around the tibia area, anyway.
11 There wasn't at that time any bone visible. I feel it could
12 be treated with the local soaks, acidic acid, and changing
13 the dressing and making sure there wasn't a growth infection.
14 We got cultures. They were mostly skin contaminants, we did
15 not believe them to be important enough to start him on
16 massive antibiotics.

17 Q What do you mean by skin contaminants?

18 A Everybody has sometype of bacteria on the skin.
19 It lives there sort of dormant, not causing any problem.
20 They can be cultured.

21 MR. KELNER: Can or cannot?

22 THE WITNESS: Can be cultured.

23 Q To the best of your recollection, was it your
24 understanding at that time that acidic acid soaks would be
25 sufficient response to this skin contaminant?

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2 A Yes.

3 Q Would you just generally describe for us, and
4 I don't want you to read the notes, we've already gone over
5 them, but generally your recollection, what was the patient's
6 condition between July 6th and July 28, 1972?

7 A Before I saw him?

8 Q July 6th.

9 A I'm sorry.

10 It was mostly localized problem of this wound
11 with no coverage on the subcutaneous area of the -- over the
12 bone.

13 He did not have any fever. His white count
14 was normal. The differential, which means what type of blood
15 cells were there were normal.

16 There isn't any history of night sweats or
17 any type of evidence of the bacteria that were present were
18 giving any major problem.

19 Q To the best of your understanding, are these
20 various facts you ticked off for the Court, are these
21 diagnostic techniques?

22 A In a sense, yes, sir. The white count would
23 give us an idea whether there was an active infection going on.
24 It should be elevated. I believe he had one elevation three
25 days after surgery, which is typical. Then it comes back down.

Neviaser - direct

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The fever was elevated once, I believe, for a couple of days after the surgery.

Q You are talking about the surgery of July 28th?

A no. After his initial surgery his fever never went up. That was the only time he was elevated.

This gave us an idea we were essentially on pretty safe ground and we felt we would continue the way we were going.

Q What was the status of the fracture at this time?

A The fracture was being held adequately by the nail. It was not moving about. I felt there was good stability to it.

(continued next page)

1 Q Was there any evidence that this localized
2 situation that you described for us was involved with the
3 fracture site?
4

5 A Not at that time, no. I never thought it was.
6 I didn't want to open up the wound to find out for fear of
7 putting it into the fracture site.

8 Q Did there come a time, now -- you might direct
9 your attention back to the progress notes for the last week
10 of July, page 29.

11 Did there come a time when you decided to put
12 a graft on this wound?

13 A Yes, sir.

14 Q Would you tell us as much as you can at this
15 time about this decision? What prompted it? What did you do?

16 A At this time the subcutaneous portion of the
17 wound looked very clear with granulation tissue, which is the
18 body's way of healing with new blood supply.

19 There is no evidence of growth infection other
20 than just a superficial mucous on top of the wound which you
21 always have if it is open.

22 We felt there was an area of bone at the base
23 of the wound which we saw on the 13th of July which was now
24 at the base of the wound and we felt if we could we would graft
25 this area, burr down this part of the bone so that it bleeds

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and the graft be put onto the bone and close the wound completely.

MR. KELNER: Excuse me. The doctor keeps referring to "we." The "we" has not been identified.

THE COURT: I suppose your assistant in the operating room?

THE WITNESS: Yes, Dr. Cooper who was a captain and chief of the service was part of it.

MR. KELNER: I have not been informed that Dr. Cooper is going to be here. I would have to move to strike those portions of his answers which include the operation of the mind of Dr. Cooper.

I have no objection if he states what his opinion is. But we have no way of coping with Dr. Cooper's opinion.

MR. RUDOFISKY: Maybe I can clear that up.

Q Were these your opinions and your decision?

A Yes, sir.

Q In fact, at the time, were you conferring with other doctors with respect to this case?

A Yes, sir.

Q To the best of your recollection, was there any dispute among the doctors as to how to proceed?

A No, sir.

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Q You are telling us now about your decisions?

A Yes, sir.

Q These are your notes?

A Yes.

Q These are your recollections?

A Yes.

Q I would like to direct your attention to both your progress notes for July 23th, which is at the bottom of page 29, and to the operative report itself for July 28th, which is the third or fourth page.

A Yes, sir.

Q Would you describe for the Court what you did in performing this surgery? Was there surgery?

A Yes.

Q What did you do?

A Essentially, we cleaned up the wound with antibiotic soap, dressed it, also dressed an area on the left side from which we would take a graft.

The bone at the base I burred away superficially the discolored bone I thought was possibly dead to bleeding bone underneath.

Q Let me stop you. What did you do? Did you do this by hand to burr the bone away?

A I used a hall drill which has circulatory

1
2 motion very fast. It was like a dental drill, as you see in
3 a dentist.

4 MR. KELNER: Excuse me. The witness can
5 testify to what he did but he keeps saying we used a
6 drill. I have a problem with that.

7 THE WITNESS: I did it.

8 THE COURT: Maybe it's his method of explaining.

9 Q Did you perform the surgery?

10 A Yes.

11 Q Did somebody assist you?

12 A Yes.

13 Q Who?

14 A Dr. Cooper.

15 Q You were the Chief Surgeon?

16 A Yes.

17 Q You did these things?

18 A Yes, sir.

19 I cleared away the bone --

20 Q I want to go back to this drill.

21 Would you tell us or describe to the Court, if
22 you can't tell us, describe with your hands or if you want to
23 draw a little diagram, how this drill operates on the bone
24 and the way that you used it?

25 A Yes.

1
2 Q Did you drill into the bone? 7-448

3 A No. We can use a blackboard, if you want.

4 MR. RUDOFSKY: Can we?

5 THE COURT: Yes.

6 (Witness steps down to the blackboard.)

7 THE WITNESS: Essentially, the drill itself is
8 about this long (indicating) and on the end of it is a
9 snap.

10 THE COURT: Would you say that is about five and
11 a half inches long, six inches?

12 THE WITNESS: About seven or eight inches.

13 MR. KELNER: Excuse me? What dimension was that?

14 THE WITNESS: Six or seven inches, eight inches.

15 MR. KELNER: The length of the drill?

16 THE WITNESS: The appliance that makes it turn.

17 At the end of it you can snap in a
18 multitudinous number of little drills, burrs, and
19 numerous sizes of drills and burrs that will fit in
20 that hole.

21 The burr essentially is on the rod that goes
22 in here (indicating).

23 It is oblong like this with serrated edges.

24 What you do, if this is a side view of a bone
25 (indicating) --

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2 THE COURT: Can we describe that drill as
3 having a cylinder-type housing? At the end is there
4 a receptacle for the drill?

5 THE WITNESS: Yes. This is connected to an
6 air pump (indicating).

7 THE COURT: Is it referred to as a pencil drill?

8 THE WITNESS: I think I know what you are
9 talking about. It is connected to air.

10 THE COURT: Okay.

11 THE WITNESS: The front part of the bone,
12 from the side (indicating). We will make this the
13 lottes nail. This is what we call a cortical bone
14 (indicating).

15 This here is the cortical bone on the top and
16 this is the bottom (indicating).

17 Say the fracture is here (indicating). The
18 opening --

19 THE COURT: Doctor, just for the record, if it
20 ever goes higher -- I know what you are talking about
21 -- but if it goes to a higher court, this has to be
22 describe for the record. When you are describing that
23 portion of the leg, would you describe which portion
24 you are referring to?

25 THE WITNESS: The fracture was at the mid-portion

1 of the tibia.

2 THE COURT: Below the knee?

3 THE WITNESS: Yes, and in front. In medical
4 terms, that is anterior.

5 The wound itself was superior or above the
6 fracture in an area along this line (indicating).

7 That is what we call proximal. Proximal to,
8 which means closer to the head of the fracture.

9 The area of bone is just burred essentially --
10 we burr it literally so that this area is taken off
11 (indicating) to a bleeding bone.

12 It is still cortical bone. It is not into
13 the soft bone or marrow.

14 We burred off the bone that was dried out.

15 THE COURT: It's a cleansing operation?

16 THE WITNESS: Yes.

17 Q Could you just tell us, to the best of your
18 recollection, what was the distance between the distal end
19 of the wound and the fracture site?

20 THE COURT: With your fingers.

21 A Two or three inches.

22 THE COURT: Good enough.

23 Q At any time during this burring operation, did
24 you drill into the bone in the normal use of the word drill
25

1
2 as we know it?

3 A No, sir.

4 Q How much of this bone was dead, to the best of
5 your recollection?

6 MR. KELNER: If your Honor please, I object
7 to that because the witness has said it is possibly
8 dead. Counsel is supplying something here --

9 MR. RUDOFISKY: I will rephrase it.

10 Q How much of the bone was possibly dead, to the
11 best of your recollection?

12 A It's a small area. I can't give you depth.
13 It's almost like a millimeter in length. Maybe about two
14 centimeters in width. One centimeter, from what I remember.

15 Q Based on your recollection in your operative
16 report, was any portion of the bone alive?

17 A Yes, sir. The area underneath the burring bled
18 which indicated to me it was alive.

19 Q We have heard an opinion expressed in this
20 trial that when you performed this skin graft you graft
21 dead skin essentially from the opposite side to dead bones;
22 is that what you did?

23 A No, sir.

24 Q Can you tell us what you did?

25 A Essentially a skin graft is dead as soon as

A On the 31st of July, which was three days after the surgical procedure, the skin graft was taking

1
2 nicely so far to granulation tissue and upper bone. Lower bone,
3 no adherence.

4 We started on the salin dressing on the 1st
5 of August and there was noticed to be some pus over the bone.

6 Q Did that alarm you?

7 A No, sir.

8 Q There are medical reasons why it didn't alarm
9 you?

10 A As I said, any area open, not covered by skin,
11 will have an area of mucous material that will have some
12 infection in it. The soaks and so forth were used to treat
13 that.

14 Q We have heard an opinion expressed in this
15 trial that when you performed this surgery on July 28, 1972,
16 that you should have, among other things, that you should
17 have used an irrigation and suction method in connection with
18 the surgery.

19 Can you tell us your opinion, or based on your
20 recollection, whether it was possible, if it was possible,
21 why you did or didn't elect to do it?

22 A I venture to say there are a lot of ways of
23 treating this problem that I was faced with at that time with
24 my comrade.

25 This certainly would have been the last thing

1
2 I would have thought of and indeed did think of but did not
3 use this method.

4 That is mainly because I felt that the area was
5 open, was not near the fracture site, that the bone was being
6 healed well by the nail. There was no evident systemic or
7 body involvement in the infection.

8 If I open up the wound more I would for sure
9 take whatever bacteria was localized in the area of the
10 drawing that I showed you, and I would definitely be putting
11 it into the fracture site.

12 From there you would get definitely an infection
13 in the fracture site and probably go on to what we call a
14 non-union, which means there is not bone growth across the
15 fracture and it would be an infected non-union.

16 I would rather have union and stability to a
17 fracture than not have than not have any at all.

18 This is the reason I would not whatsoever
19 institute suction irrigation. Suction irrigation, it depends
20 on what he meant, but what I believe suction irrigation would
21 be a closed system leaving suction irrigation tubes in and
22 out of the wound and the wound is closed over this area.
23 Some of the tubes suck out the fluid and some of the tubes
24 put in the fluid.

25 This is not at all a perfect way of doing things.

1
2 The tubes often clot up both with mucous, blood and granulation
3 tissues. And can actually go into an abscess with infection
4 still being in there if the tubes are not functioning
5 continually.

6 That being over the area of the fracture, which
7 you had to remove its only source of blood supply called the
8 periostium to get your tubes in, only leads me to believe
9 you definitely are going to have a non-union.

10 That is one of the reasons I didn't use that
11 technique.

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13 (continued next page)
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2 Q Now, during the period following the July 23,
3 1972 surgery, how did Mr. Lennon do from a medical point of
4 view?

5 A Well, eventually the wound in the skin grafting
6 healed.

7 We tried to get him into a short walking cast
8 which essentially is a cast that has a walking heel on the
9 bottom so that we retain knee motion.

10 This happened to be uncomfortable to him so we
11 changed this cast to a long leg cast which essentially stopped
12 knee motion.

13 And he was discharged with a long leg walking
14 cast. He did have some drainage at that time.

15 Q What were you doing to treat the drainage, if
16 anything?

17 A He was on an antibiotic by mouth.

18 Q Would you tell us where that is reflected in the
19 records?

20 A Discharge summary, last sentence, during the
21 period of hospitalization, Keflex 500 milligrams, PO, that is
22 by mouth, QUID, four times a day, and discharged.

23 Q Could you take a look at the doctor's orders
24 for this period and see if there is a note that confirms that?

25 A (No response.)

Q Do you see any orders for after August 14th?

A No, I don't have any orders after August 14th on this chart.

Q Do you have any recollection based on that discharge summary or otherwise --

MR. KELNER: That is objected to. The doctor testified there is nothing in the doctor's orders for Keflex and now counsel is --

THE COURT: He can't base it on the record. If there is nothing in it, he can't refresh his recollection from it.

MR. RUDOFISKY: There is something in the discharge record.

THE COURT: If he can find something.

Q Do you have any personal recollection of prescribing Keflex or any other antibiotic which is not covered by the notes?

A Based on the discharge summary, I wouldn't have said it unless I did.

MR. KELNER: That is just speculation.

THE COURT: That is sort of a positive negative. We can't go through that.

Q Did you sign the discharge summary?

A Yes sir.

1 Q Is that your signature there?

2 A Yes sir.

3 Q To the best of your recollection, did you read
4 the discharge summary before you signed it?

5 A Yes.

6 Q Were you familiar with Mr. Lennon's case at the
7 time you read it and signed it?

8 A Absolutely.

9 Q Now, I would like you to turn your attention,
10 if you would, to --

11 THE COURT: This might be a good time to take
12 a short recess.

13 (Recess taken at this time.)
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THE COURT: All right, we are ready to resume.

THOMAS NEVIASER, having been previously
duly sworn, resumed the stand and testified further
as follows:

DIRECT EXAMINATION

BY MR. RUDOFISKY: (continuing)

Q Dr. Neviaser, before we turn to Exhibit 2,
could you tell us, did there come a time in August -- well,
let me rephrase that.

Physically in the hospital, where was Mr. Lennon
between his admission and say mid-August, was he in a ward,
a special ward? Was he in a private room?

A He was in an orthopedic ward, F-3.

Q Did there come a time when he was no longer in
the orthopedic ward?

A Yes, sir. He was transferred over to Ward B-1
on 8/14/72.

Q To the best of your recollection, what was the
status of B-1 patients?

MR. KELNER: I have an objection to that.

With a ward of many patients I suggest that wouldn't --

MR. RUDOFISKY: Your Honor--

THE COURT: You mean what type of ward it was?

MR. RUDOFISKY: Yes.

1
2 THE COURT: I understand. What type of ward
3 was it?

4 Q I think his answer will explain the situation.

5 A It was an ambulatory ward, on crutches,
6 walking casts, who had been in F-3 unit, who were felt not
7 to be sick enough to occupy a bed in that area and were
8 transferred downstairs.

9 Q Did you continue to see Mr. Lennon with any
10 regularity after he was transferred downstairs?

11 A We had weekly visits, usually Thursday morning,
12 with the patients on B-1.

13 MR. KELNER: Again, maybe it is an inadvertence,
14 but he said "we".

15 THE COURT: I will make note of the fact that
16 he is talking about himself.

17 Q Dr. Neviaser, would you turn your attention to
18 Exhibit 2, please?

19 A Yes.

20 Q Would you identify Exhibit 2 for the record?

21 A This is a record on Robert Lennon with the date
22 of admission September 18, 1972.

23 The hospital record.

24 Q Does it have a discharge date?

25 A Yes.

A 461

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2

Q What is that?

3

A October 24, 1972.

4

Q Did you attend to Mr. Lennon during the period

5

covered by these records?

6

A I admitted him and did cover him most of the

7

time along with another doctor, Dr. Karle.

8

Q In this case, I would like you to be as careful

9

as you can not to tell us anything about Dr. Karle or using

10

the term "we." Your answers will refer to what you did or

11

didn't do.

12

A Yes.

13

Q What was Mr. Lennon's condition when you

14

admitted him?

15

A Patient was complaining of pain and drainage

16

from the right leg.

17

Q By the way, do you know where you admitted him

18

from?

19

A I don't find it in the record. I can't remember

20

where we admitted him from.

21

Q Looking at the records, you are overlapping

22

dates, do you have any idea why?

23

A I notice that. I can't give an answer for that.

24

Q Is it possible, given your knowledge of the

25

hospital practices and procedures at that time, is it possible

1 he was readmitted in B-1 in the sense of being transferred
2 back up?

3 A Yes, sir.

4 Q But you don't know that to be the fact?

5 A I don't remember.

6 Q Again, please tell us what his medical condition
7 was?

8 A Physical examination revealed that skin graft
9 area was healed with deep granulation over the bone, opening
10 to the lower wound area which had been cultured. A soft
11 fluctuant area, three to four centimeters distal to wound was
12 also noted to have some purulent drainage.

13 Q What is a fluctuant area?

14 A An area that has fluid underneath it.

15 In other words, you would move your hand over
16 the skin of a normal person and you would feel one sensation.
17 In fluctuant you feel there is some kind of fluid underneath.

18 I use the word blottatable, like a soft ping
19 pong ball.

20 Q Did you state before I interrupted you there
21 had been a culture?

22 A Culture evidently on admission.

23 Q I want to direct your attention to Plaintiff's
24 Exhibit 4 in evidence and tell me if there is a record of
25

such a culture? Plaintiff's Exhibit 4 is that red folder.

A Culture September 18, 1972.

Q What did the culture reveal?

A Staphylococcus aureus coagulase, streptococci not Group A, not Group D.

Q I want you to recall back to the July period. You testified that Mr. Lennon had these contaminants which you identified for us.

Are these organisms, staphylococcus aureus coagulase and streptococcus, are these the same organisms that were found at the wound site in July of 1972?

A No, sir.

Q To the best of your recollection, is this the first time that these organisms have been found in Mr. Lennon's case?

A YES, sir.

Q You characterized the other organisms as contaminants; can you give us a characterization of these?

A Staphylococcus aureus coagulase positive is a bacteria infection and has properties that we are unhappy with.

It can be a destructive organism.

Other times it can, in bones, drain for years and years despite antibiotics. In other words, give some

trouble.

Q Is this the first time to the best of your recollection that Mr. Lennon had been diagnoses to have these organisms in this wound?

A Looking at the record, yes.

Q How did you treat this, did you treat it?

A The patient was admitted to the hospital and elevated, placed at bed rest, given antibiotics and soaks to the right leg.

Eventually placed in a long leg cast. The drainage decreased with that type of treatment.

There was some drainage in the lower aspect of the wound we have been talking about.

Q Let me stop you. Mr. Lennon previously testified that it is his recollection that when staph positive was first cultured he was placed in isolation.

Do you have any recollection of that? If so, was it in connection with this incident?

A I recollect him being in the back room. But I cannot absolutely tell you the time and date and which admission it was.

Q Now, you say that you put Mr. Lennon on antibiotics?

A Yes.

2 Q I would like you to work with Exhibit 2 which
3 you have in front of you and Exhibit 3 which is the next
4 admission at the St. Albans, and I would like you to tell
5 the Court what antibiotics you put Mr. Lennon on and how
6 long he was on antibiotics.

7 MR. KELNER: Can I get the first date?

8 Q Yes. Working with Exhibit 2, which begins
9 September 13, 1975 -- correction, I mean '72.

10 MR. KELNER: I wonder if we can have him go
11 back to the first hospitalization to get it all in
12 context, the first antibiotic, and bringing it up to
13 date without upsetting your routine. Or I can do it
14 later.

15 MR. RUDOLFSKY: I have no objection to counsel
16 doing it on cross-examination.

17 My concern is when the staph positive showed up
18 which I believe even Dr. Koven testified was the
19 problem organism.

20 THE COURT: You can do it your way.

21 THE WITNESS: On admission, September 18, 1972,
22 he was placed on Keflex, 500 milligrams four times
23 a day by mouth.

24 Q Are you reading from a particular note?

25 A Essentially the doctor's orders.

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Neviaser-direct

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Q Is that page 6?

A Yes, sir.

(Continued next page)

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Q Let me ask you, Doctor, this note says:
"Keflex, 500 milligrams, PO --" that means by
mouth?

A Yes.

Q "QID's four times a day, X, 15 days."

What does that mean?

A Times fifteen days. That means for the next
fifteen days.

Q When is the next time you prescribed antibiotics
for Mr. Lennon?

A October 3, 1973.

Q Are you now looking at page 10 of exhibit 2?

A Yes.

Q What did you prescribe then?

A Keflex 250 milligrams, PO, QID for fourteen days

Q Discharge date on exhibit 2 is October 24, 1972,
that takes us through the fourteen day period.

Excuse me, I am sorry. Let me withdraw that.

Take a look at page 12, the order for
October 18th.

A Yes, sir.

Q Did you write another order for antibiotics then?

A Yes.

Q What?

1
2 A Keflex again for fourteen days.

3 Q Mr. Lennon was discharged on October 24th, which
4 was six days after you wrote that fourteen day order.

5 Is there any indication in the record whether
6 he was discharged on antibiotics or not on antibiotics or any
7 other characterization you might want to give the Court?

8 A I can't find anything in the records.

9 Q Would you turn your attention to exhibit 3?

10 Would you look through your orders and tell us
11 what antibiotics you prescribed and the dates you prescribed

12

13 A Admitted 11/15/72. Orders at that time, Keflex
14 500 milligrams, PO, QID times fourteen days.

15 Q When is the next time you prescribed antibiotics?

16 A 11/29, Keflex, 500 milligrams QID.

17 Q Is that for any particular length of time?

18 A It looks like fifteen days, but I can't be sure.

19 Q When is the next time you prescribed antibiotics

20 A At day of surgery, 12/13/72.

21 Q What did you prescribe on that day?

22 A Keflin, one gram, IV, Q6H, meaning every four
23 hours, piggy back, which means essentially he has an IV going
24 the entire time and every six hours another IV is placed
25 into that tubing and he gets the antibiotics over a couple of

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hours and they remove it and it is done again every six hours.

Q Could you describe for the Court the kind of surgery that you performed on December 13, 1972?

A We removed the Lottes nail, the track of this nail was irrigated, sailing, and cultured, and sent to bacteriology and three tubes of medium size were placed, two for suction and one for irrigation. And the wound was closed over the area of the surgery.

A posterior mold, which is made up of plaster, essentially for mobilization rather than full cast to check the dressing was placed on the right leg. Sterile dressing applied.

Q Essentially, is this the suction-irrigation or irrigation and drainage -- is this the method we talked about?

A Yes, sir.

Q You previously explained why in your opinion what the circumstances were and why it was not called for in July; would you explain why you utilized this method in December?

A We considered the fracture was now healed, that the nail could be removed. In order to do an adequate irrigation and antibiotics coverage of a fracture or infection, the foreign body should be removed.

1
2 In July we didn't want to do it because the
3 fracture would have fallen apart.

4 Now the fracture was healed, so now to remove
5 the foreign body and proceed to try to treat the infection.

6 Q So far as you understood, his circumstances and
7 the medicine, what would have happened if his fracture had
8 become unstable in July?

9 MR. KELNER: I suggest that is speculative.
10 I think it is self-evident. He already stated the
11 reason why he did not do the procedure.

12 MR. RUDOFISKY: I think it is self-evident also.

13 THE COURT: Okay.

14 Q Now, with respect -- I would like to go back
15 to exhibit 2 for a moment. I believe it is 2. That is the
16 second admission.

17 Did you write a note with respect to that
18 admission suggesting or stating that there was an infected
19 non-union?

20 MR. KELNER: Can you tell me what page you are
21 referring to?

22 MR. RUDOFISKY: Off the record.

23 (Discussion off the record.)

24 THE WITNESS: Page 5 is my impression.

25 Q Page 5, thank you.

1
2 Could you tell us, first of all, would you read
3 into the record what you wrote?

4 A Impression at that time was status, post right
5 tibial open fracture, open skin slough, slit thickness skin
6 graft.

7 Now, probable infection, non-union, right tibial
8 fracture.

9 Q At this point, today, we obviously have the
10 benefit of -- well, withdrawn.

11 When did you write this note?

12 A The day after admission.

13 Q Was your initial impression correct?

14 A No, sir.

15 MR. KELNER: Well -- I'm sorry, go ahead.

16 Q Did Mr. Lennon at any time that you treated him,
17 did he develop an infected non-union?

18 A No, sir.

19 Q What was Mr. Lennon's condition when you
20 discharged him the last time on December 29, 1972?

21 A There was no drainage, in a short leg-
22 walking cast, and he was discharged.

23 The drainage sites were dry and the closed
24 suction irrigation tube and so forth had been removed.

25 Q Had his fracture healed, tibial fracture?

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A Yes, sir.

Q Did Mr. Lennon at any time during this hospitalization, from June 9, 1972 to December 29, 1972, did he have a deep-seated infection, thoroughly engaging the bone?

A I don't believe so, no, sir.

Q Is there any evidence in the medical records that he had such an infection?

A No, sir.

Q Did he ever have an infection that would prevent healing of the fracture?

MR. KELNER: These are all leading questions.

I know there is no jury here but --

THE COURT: I think the last question is objectionable.

Q During this period, June 29th to December 29, 1972, did Mr. Lennon have an infection at or about the right tibia that prevented healing of the bone?

MR. KELNER: I object to that, if your Honor please. I have no objection to him testifying to what his condition was and what the sequence of events was. Counsel is now putting conclusory labels on a series of events.

MR. RUDOFSEY: The reason I am asking this question is, I am framing this in terms of Dr. Coven's

1
2 testimony.

3 THE COURT: I understand that.

4 MR. RUDOFISKY: I will be more than happy to
5 state that Mr. Kelner can cross-examine certainly on
6 this point without limitation from my point of view.

7 I don't see any other way to put Dr. Coven's
8 testimony before this witness and find out whether
9 actually it is true.

10 THE COURT: We all know that the bone was not
11 infected at some point. If you can pinpoint it along
12 those lines, I will allow it.

13 Initially there was nothing wrong with the bone
14 except the fracture.

15 MR. RUDOFISKY: Agreed.

16 THE COURT: Take it from there.

17 Q Taking it from that point, Mr. Lennon came into
18 the hospital, did he ever develop an infection in his right
19 tibia that prevented his bone from healing?

20 A No, sir, it healed.

21 MR. RUDOFISKY: I have no further questions, your
22 Honor.

23 MR. KELNER: Shall I proceed, your Honor?

24 THE COURT: Sure.

25 (continued next page)

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CROSS-EXAMINATION

BY MR. KELNER:

Q Doctor Naviaser --

THE COURT: Before you proceed, I have a housekeeping procedure.

You rested subject to Dr. Coven being called for additional cross-examination which has not been completed, is that correct?

MR. KELNER: That is correct.

THE COURT: The Government, of course, is reserving its rights to make motions addressed to the issues --

MR. RUDOFISKY: Yes.

THE COURT: For all intents and purposes you rested except for that?

MR. KELNER: That is correct.

THE COURT: All right.

Q Doctor, when were you graduated from medical school?

A '62. No, '66, medical school. '66.

Q Did you serve as an intern and resident?

A Yes.

Q When did you complete your resident training?

A '71

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2 Q That is the year before this young man was
3 injured in June '72, is that correct?

4 A Yes.

5 Q When you completed your residency in 1971, then
6 where did you continue your career?

7 A St. Albans Naval Hospital.

8 Q When did you start there?

9 A July, 1971.

10 Q July 1971?

11 A Yes.

12 Q You had been on duty almost a year at
13 St. Albans when Mr. Lennon was admitted June 9, 1972, is that
14 correct?

15 A Yes, sir.

16 Q What was your experience or routine during
17 that year before June '72?

18 A (No response.)

19 Q What kind of cases were you treating and handling

20 A Mostly veterans and guys who were from Vietnam.

21 Q They had a variety of injuries?

22 A Yes, sir.

23 Q I take it there were a number of doctors on
24 duty who were specialists in various fields of medical
25 treatment, is that correct, in addition to yourself?

1
2 A In what fields?

3 Q Neurology.

4 A Yes.

5 Q Internal medicine specialists?

6 A Yes.

7 Q Specialists on cultured and sensitivity of
8 bacteria related to various types of infections?

9 A St. Albans Naval Hospital did not have any
10 infectious disease expert. They had a pathologist who was
11 essentially there to read microscopic slides.

12 Bacteriology and cultures were done by ancillary
13 professional persons, bacteriologists and so forth, but no
14 infectious disease person was available to us.

15 Q It is widely known where you have a compound
16 fracture that that might be a frequent source of infection,
17 is that right?

18 A Yes.

19 Q That is a fracture of a bone where there is an
20 opening to the outer air?

21 A Yes.

22 Q That is what Mr. Lennon had?

23 A Yes.

24 Q Any orthopedic surgeon, even though not a
25 specialist in internal medicine or bacteriology, or in the

performance of culture sensitivity tests, is on the alert or should be on the alert, about the possibility of infection because of the open wound aspect?

Is that a fair statement?

A Yes.

Q Whose decision would it be to select a particular type of medication, whether it is antibiotic or anything else, in handling an open wound fracture such as this was, the compound fracture?

A The physician in charge.

Q You were the physician in charge, is that so?

A Initially, no, sir.

Q I beg your pardon.

You came into the case on June 29, 1972, is that correct?

A Yes.

Q Some 20 days after he was admitted to the hospital, is that correct?

A Yes.

Q Following the operation that was performed, I think the day of entry was June 10, 1972, for the first two weeks or so this was a rather uneventful type of case?

A Yes.

Q There was nothing extraordinary, no infection.

1
2 other than the initial post-operative complaints one might get
3 from a person who has an operation on the leg, is that correct?
4

5 A Yes, sir.

6 Q The first significant event, is it fair to say,
7 as far as some abnormality was concerned, was a finding of
8 sloughing on June 29th, when you came on the case?

9 A Yes, sir.

10 Q Sloughing is indicative of a breakdown of
11 tissues or infection or necrosis of skin tissues?

12 A Necrosis.

13 Q That means death of tissue?

14 A Yes.

15 Q And so you as the -- Were you called the
16 physician in charge of this patient at that time? You noted
17 that in the record, didn't you?

18 A Yes, sir.

19 Q What was the source of that sloughing or necrosis?

20 A (No response.)

21 Q What was the cause of it?

22 A Decreased blood supply to that one area.

23 Q The necrosis would be indicative of a breakdown
24 of the - living tissue by also perhaps the introduction of
25 bacteria from the outside into the wound area, isn't that so?

A I don't agree with that point.

Q But you can't rule it out specifically, can you?

A (No response.)

Q In view of what you told us earlier, where you have a compound fracture, you have an open wound where outside bacteria can penetrate in the tissue down to the bone which has a compound fracture?

A We are getting two different things. You are talking about compound fractures or necrosis of the skin, which one?

Q Beneath the skin you have a fatty layer and muscles and tendons and ligaments and blood vessels and nerves, all the way down to the bone, is that correct?

A Yes.

Q On June 29th, what you found was on the surface, visible to the eye, a sloughing of tissue?

A Of the skin.

Q And, sir, the wound had been opened with an incision during surgery and a metal rod inserted?

A Yes.

Q So any surgery then, if it wasn't a compound fracture, where you open up the tissue, infection is always a very, very important thing to be concerned about, isn't that so?

A Yes.

Q Because the open air, even in a sterile atmosphere

1
2 such as an operating room can still have bacteria in the
3 atmosphere?

4 A Yes.

5 Q That's why you sterilize instruments and
6 surgeons scrub up before you go to surgery?

7 A Yes.

8 Q In spite of all that, there was on June 29th
9 a visible sloughing of the tissue, is that correct?

10 A Yes.

11 Q Whether it came from the original injury which
12 caused the compound fracture of the bone with an opening to
13 the outside air or by the introduction of some bacteria during
14 the surgical process of cutting open further, you know at
15 that time there was a sloughing caused by some microbe, some
16 bacteria, perhaps?

17 A That is not true.

18 The skin dies because it has no blood supply.
19 You can have skin infected and it won't die.

20 Q In this case the sloughing, you say in your
21 opinion, was due due to an interruption of a normal blood
22 supply?

23 A Yes.

24 Q Could it also have been caused, with certainty,
25 absolute certainty, not be caused by bacteria?

1
2 A I don't believe it was caused by bacteria.

3 Q Did you consult anyone who is a bacteriologist
4 or specialist in such matters you admittedly were not?

5 A I didn't have anybody to consult who was an
6 expert.

7 Q Can I take you on further to July 5th, without
8 taking the time to look through the pages, there is an
9 indication pus was found?

10 A Yes.

11 MR. RUDOPFSKY: That is July 6th.

12 MR. KELNER: 5th and 6th.

13 MR. RUDOPFSKY: July 5th there was demarcation.

14 Q July 5th is called an exudate from some body
15 function?

16 A July 5th?

17 Q I'm sorry, in general, what is pus?

18 A White blood cells.

19 Q It caused an exudate from the blood supply
20 where the area is injured --

21 A Yes. In which there are bacteria present. You
22 can have an exudate and not see pus.

23 Q Where you have the body processes attempting to
24 heal an injury, the body miraculously throws out processes --
25 not even the greatest doctor knows that the body rushes blood

1
2 to the area and puts out various chemicals in an attempt to
3 repair what is injured?

4 A Yes.

5 Q Pus is one of those processes, isn't that so?

6 A Yes. Essentially you are talking about white
7 blood cells that come from the blood vessels to attack bacteria.

8 Q Then if you had pus on July 5th or July 6th,
9 there was bacteria present which the pus process would be
10 attempting to , so to speak, combat to try to overcome the
11 presence of bacteria there, isn't that so?

12 A We had three organisms.

13 Q Isn't that so?

14 A You want to repeat it?

15 Q There were bacteria present in the pus attempting
16 to combat the bacteria?

17 A Yes.

18 Q Because otherwise if you didn't have something
19 going the bacteria would cause a further infection and spread
20 with very dire consequences, isn't that so?

21 A I don't agree with that.

22 Q Then naturally there was infection there on
23 July 5th and 6th to some extent?

24 A There was some pus on top of the granulation
25 tissue that was underneath the sloughed skin, yes.

Neviaser - cross



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Q This pus indicated there were bacteria present,
isn't that so?

A Well, yes, sir, these three we were talking about
(continued next page)

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2 Q There were bacteria and an infectious process
3 evident?

4 A There were bacteria there, yes.

5 Q Then from July 5 or July 6, 1972, were you then
6 in a position where you stated you were not alarmed, -- were
7 those the words you earlier used?

8 A I don't remember using alarmed. I said -- I
9 don't remember exactly what I said. Something along those
10 lines.

11 Q Assuming that is a fair phrase to use for your
12 state of mind as a physician in charge of Mr. Lennon, why
13 would you not be alarmed when you saw that pus situation
14 there with the bacteria present?

15 A Because I figured these soapy type of tissue
16 was normal for the body to do that when the skin sloughs.
17 No skin being there, the skin contaminants are at the next
18 level.

19 They are very low of virulent and I wasn't
20 alarmed.

21 Q Did you consider the fact that this was a
22 compound fracture and what is visible on the surface may
23 penetrate through all the layers of the skin, muscle,
24 tendons, all the way to the bone?

25 A The wound, approximately three-quarters of the

1 wound, was not involved at all in the skin breakdown.

2 And part of that wound was over the fracture.

3 It would have to dissect a great way before it
4 got to the fracture.

5 That was it.

6 Q On the day that he was injured and before the
7 operation took place, there is no question that this being
8 a compound fracture there was an operation and breakdown of
9 all of the tissues from the surface of the skin down to the
10 bone; is that correct?

11 A Yes.

12 Q It was opened up further when the incision was
13 made in order to get at the bone, setting the bone, and
14 putting in the metal rod; isn't that so?

15 A Yes.

16 Q All of that was not completely closing and
17 healing overnight, the break that he had had down to the bone
18 before the operation and after the operation; isn't that so?

19 MR. RUDOFISKY: I object to the phrasing of that
20 question. We are not talking about overnight; we are
21 talking about from July --

22 MR. KELNER: I will get to that.

23 MR. RUDOFISKY: That is approximately a month
24 after the initial operation.
25

MR. KELNER: I will withdraw it.

Q Doctor, right after the operation, he was sutured; is that correct?

A I believe so.

Q That would be normal?

A Yes.

Q When he was sutured up, the fact is these tissues that had been broken through and not healed up overnight; is that so?

A If I can look at the operative report.

Q Can't you answer that without looking at the report?

A No way.

Q Let me withdraw my question to save time.

On July 5 and July 6, with the presence of pus, did you assume that this was merely a superficial sloughing with nothing underneath the sloughing visible all the way down to the bone, was that your assumption and opinion in the way of inspection and breakdown of tissue or lack of normal blood supply?

MR. RUDOFISKY: Your Honor, that is four questions.

MR. KELNER: I will break it down.

Q Sir, the blood supply which you say was

1 interrupted by either the operation or the injury, interrupted
2 the blood supply in what area?

3
4 A The skin and the proximal portion of the wound.

5 Q In cutting down to the bone, during the
6 operation, would you have had to cut through the various
7 channels of blood supply to get there?

8 MR. RUDOFISKY: Excuse me. For the record,
9 this is not the physician who did the operation.

10 MR. KELNER: I beg your pardon. We went into
11 this before.

12 Q Would the operating surgeon at that time have
13 to dissect tissue in order to get at the bone to set the
14 bone?

15 A Yes, sir.

16 Q To that extent, on that temporary basis, there
17 would be an interruption of the blood supply, therefore the
18 deeper tissue as well as down to the bone --

19 A That is a technical question, I guess. You
20 can see some of the blood supply is disrupted any time you
21 have a cut.

22 Q When you say sloughing on the surface of the
23 skin, on June 29, was it your opinion or assumption that the
24 only interruption of blood supply was on the superficial
25 visible area of the skin?

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A Yes, sir.

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Q You assumed there was no interruption of the blood supply to the bone or deeper tissue?

5

6

A There was by the injury and by the subsequent surgery.

7

8

However, with the lining of the bone still intact in the back part he had still supplied to the bone, yes, sir.

9

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11

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Q Were there any antibiotics given to him between June 9, the day of the operation, and June 29th, twenty days later, when you came onto the case?

13

14

A I believe he had antibiotics up to the 25th of July.

15

16

17

Q What kind of antibiotics?

A I believe it was Kefflin by vein and then by

mouth.

18

19

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Q Kefflin?

A Kefflin intravenously and Kefflex, which is the same except in pills.

21

22

23

Q The fact is Kefflin is not a specific antibiotic for any and all infectious bacteria and sources of infection?

24

25

A No.

Q What culture sensitivity test was taken for the

1 very first time as shown in the record? What date?

2 A By this record it is July 6, 1972.

3 Q July 6, 1972?

4 A Yes.

5 Q What is the reading on the culture -- withdrawn.

6 On what date did the report come back on that
7 July 6th culture test?

8 A (No response.)

9 Q About a week later.

10 A July 11, I guess.

11 Q Five days later?

12 A It was read by the bacteriology laboratory at
13 St. Albans Naval Hospital.

14 Q Do you know what specific readings there were
15 as to what microbes or bacteria were identified?

16 A Yes.

17 Q What are they?

18 A Herellea, vaginocola, staphylococcus ereus,
19 coagulates negative, aerobacter species.

20 Q Looking at this herellea vaginocola, did you
21 have sufficient background information at that time to know
22 whether or not Kefflin would be a proper antibiotic for
23 that particular source infection?

24 MR. RUDOFISKY: I object to this. There is no
25

testimony or evidence that Kefflin was given as a result of this test.

The record will bear out it was given June 9 or June 25th.

The first antibiotic Dr. Neviaser prescribed is tetracycline which is July 18th.

MR. KELNER: I stand corrected. I am sorry.

Q These three. Would you call them bacteria sources for the record?

A Bacteria.

Q These three separate bacteria strains, I will call them, if I may, were these sources of infection as identified by the cultured sensitivity test taken on July 5th or 6th?

A What infection?

Q The infection pertaining to the pus that was found on July 6th.

A That was cultured from that.

Q The reason you took the cultures, you knew this was a source of infection; isn't that so?

This was an area of infection, July 5th and 6th?

A The reason for taking the culture is to see what bacteria are growing.

Q Do you remember now when you actually got this

3 1

2 report, was it July 11th?

3 A I don't remember.

4 Q In any event, you did nothing to prescribe a
5 particular antibiotic until July 18, according to the record?

6 A That is not right.

7 Q Show us something in the record that is
8 contrary and I will apologize.9 A I applied acetic acid soaks to the wound. I
10 was treating those contaminants.11 Q In other words, only on the surface are you
12 telling this Court that you used a soak to just either wash
13 or wipe away on the surface the pus that you saw there oozing
14 up in that area?

15 A No, sir.

16 Q What did you do with the soaks?

17 A Acetic acid is a bactericidal agent.

18 Q In lay terms, so we understand, what is that?

19 A Kills bacteria.

20 Q And this was what solution on the soak?

21 A I think originally one per cent acetic acid.

22 Q That is an antibiotic?

23 A When used in soaks for infection it can be a
24 local antibiotic, yes, sir.

25 Q You say it can be. Is it also used just to

2 clean off superficial wounds?

3 A To prevent infection, yes, sir.

4 Q You find something amusing, Doctor?

5 A No. It is doing the same thing. When you say
6 clean off a wound, what you are trying to do is avoid
7 infection.

8 The acetic acid was doing that. I was trying
9 to prevent more infection from the little contaminants.

10 Q You were trying to clean off the pus which
11 would be permeated with the bacteria but you are not getting
12 at the deep-seated source of infection if there was one?

13 A There was none.

14 Q How do you know that, Doctor, when all you did
15 was wipe off or clean off the superficial area that had pus?

16 Can you tell us how you would know what the
17 status of the bone is which is not visible on examination?

18 A It was a superficial infection. And it did not
19 go anywhere else, mainly because of the reaction of the skin
20 or the tissues underneath it did not provide what we call
21 edema which is redness, swelling, tenderness in area, it did
22 not have any fever, did not have white count.

23 Q Have you finished?

24 A Yes.

25 Q Did there come a time that you knew the bone

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2 itself was infected and there was osteomyelitis?

3 A Yes.

4 Q Give us the date of that, sir?

5 A (No response.)

6 Q You do know on July 28th the very same month
7 when you found dead bone, did you not?

8 A Yes.

9 Q Which you proceeded with a drill to remove?

10 A There was some dead bone, yes, sir.

11 Q Was that dead bone there on July 6th when the
12 pus situation was visible to the naked eye to the examining
13 doctor?

14 A I doubt it.

15 Q You do?

16 A Yes.

17 Q When did the dead bone start to be treated?

18 A When the soft tissues over it had pulled away
19 to allow the bone to be visible. At which time there was no
20 blood supplied to the small area.

21

22 (continued next page)

23

24

25

2 Q How large was this dead bone area that you drilled
3 in to?

4 A I did not drill into it. I burred it.

5 Q Look at the operative records that you yourself
6 prepared.

7 Let me read it to you to refresh your recollection.

8 (Pause.)

9 Q Under procedure -- by the way, you were the one
10 that signed this report in Plaintiff's exhibit 1?

11 A Yes.

12 Q Read with me, sir. "After the patient was
13 preped and draped in the usual manner the right tibial wound
14 was explored. And severe areas of pus were identified. And
15 the wound was open. In order for this to be drained
16 completely, the bone at the base which was dead --" And may
17 I interrupt, didn't you say it was possibly dead and when
18 this report was prepared back in '72 you said it was dead?

19 A Yes, superficial portion dead.

20 Q The bone at the base which was dead was cleared
21 away with a hall drill through bleeding bone. You drilled
22 through the bleeding bone, isn't that so?

23 A No. The hall drill -- this is a typographical
24 error which I did not see. It should be to, to bleeding bone.

25 Q Sir, you signed this in your own handwriting,



1 and you dictated it?

2 A Yes.

3 Q Isn't it essential for every significant in
4 a hospital record --
5

6 MR. RUDOFISKY: I would like the record to
7 reflect that there is no jury here and he is not going
8 to give any different answers by counsel screaming at
9 the witness.

10 MR. KELNER: I am sorry. That is my way --

11 MR. RUDOFISKY: We will get the same answers
12 whether you scream or not.

13 THE COURT: The court will consider it without
14 the raising of the voice.

15 MR. KELNER: I hope you will caution me if I
16 do it again.

17 THE COURT: It happens to all lawyers.
18 It even happens to me sometimes.

19 MR. KELNER: Thank you sir, I am glad I have
20 company.

21 Q Is it a fact that every significant or
22 important event in a handling or care of a patient is supposed
23 to be accurately written down and entered into the hospital
24 record?

25 A As accurately as humanly possible.

1
2 Q Is it essential and required that the opening
3 surgeon accurately prepare an operation report which is what
4 this page is, dictate it and sign it after reading it?

5 A Yes.

6 Q You are saying you did this incorrectly?

7 A I didn't say I did it incorrectly. In reading,
8 for all intents and purposes, to me through bleeding bone
9 does not mean the same as it does to counsel.

10 Through bleeding bone you burred off the top
11 and continued to burr through bleeding bone to make sure it
12 is all cleared. To a lay person it is different. To bleeding
13 bone is probably best explained for what I did.

14 Q You say that is one correction that should be
15 made, is that right?

16 A To me it doesn't need to be corrected. For you
17 it should be corrected.

18 THE COURT: How about me?

19 THE WITNESS: Yes sir?

20 THE COURT: You say to him. I am the one who
21 must make the determination. It should be corrected as
22 far as through may mean you go through a door but if
23 you go to a door that means you go to it and you are
24 going to stop.

25 THE WITNESS: In medicine we don't have that.

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2 THE COURT: For your edification, at this point;
3 Government attorney, Mr. Kelner, and Judge Costantino
4 have heard thousands and thousands of medical cases.
5 I want you to know that. We've heard many orthopedic
6 cases, many, many cases involved with cerebral problems
7 and others. Don't take it so lightly.

8 THE WITNESS: I am not.

9 Q Would this be an error wherein your original
10 testimony you said this bone was possible dead and the record
11 which you dictated and signed after it was typewritten said
12 the bone at the base which was dead was cleared away with a
13 hall drill through bleeding bone? That is an error, instead
14 of saying possibly dead it was dead?

15 A The superficial portion that I removed was dead.

16 Q It was dead?

17 A Yes.

18 Q How wide an area was dead when you opened up
19 during the surgery?

20 A From what I can recollect the area was
21 approximately two to three centimeters long, maybe a centimeter
22 wide.

23 Q In inches?

24 A About an inch and a half by a half inch.

25 Q An inch and a half wide, that means --

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A Width means across.

Q In other words, are you --

A You cannot see width on that one (indicating.)

Q An inch and a half wide, this way or this was
(indicating?)

A This way (indicating.)

Q If this is the leg, the knee up here, is the
area of dead bone running lengthwise? Did you say an inch
and a half?

A Yes. An inch and a half.

Q Lengthwise?

A Yes. Right where that is drawn (indicating.)

Q Here?

A No, outlined in chalk where I burred. That is
the area we are talking about.

Q Was the dimension of an inch and a half, was
it lengthwise on the leg or cross wise on the bone?

A An inch and a half is length wise. Going up
and down the bone. And the width is across.

Q If it was an inch and a half -- by the way,
you didn't even write down in the report how much of necrotic
or dead bone there was, isn't that so?

A Yes.

Q You are now relying on your memory of an event

1 which took place four and a half years ago?

2 A Yes.

3 Q Almost 5 years?

4 A Yes.

5 Q Your best memory is that an inch and a half.

6 A Yes.

7 Q Would it have been more than an inch and a half?

8 A I don't believe so, no.

9 Q When you have necrotic or dead area of a bone,
10 it starts to die at one microscopic little point and then
11 spreads out?

12 A No.

13 Q Does it all become dead at one time or does it
14 start with a small area?

15 A Could be either way, a small area that stays
16 there or an area superficially that doesn't have a blood supply
17 starts to die superficially on the surface.

18 Q On July 28th when you opened up during surgery
19 and saw an inch and a half in height of necrotic bone, how long
20 in your opinion did it take to form that size of dead bone?

21 A IN this one case I would just say --

22 Q Three weeks perhaps?

23 A No.

24 Q Four weeks?

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A No, maybe one week.

3

Q Maybe one week?

4

A Yes.

5

Q Had you had any previous experience at that

6

time, you having been out of your residency for one year,

7

had you had any other situation like this as a necrosis bone

8

which was discovered after compound fracture and reduction

9

of the fracture on surgery?

10

A Yes.

11

Q How many times?

12

A I cannot remember the exact number.

13

Q More than one time?

14

A Yes sir.

15

Q Your best estimate is that that process has

16

been taking place for only one week?

17

A From what I say, yes sir.

18

Q Could it have been more?

19

A I doubt it.

20

Q But could have been, is that right?

21

A (No response.)

22

Q Could have been as long as July 5 and 6 when the

23

pus situation was noted at the surface of the wound?

24

A I don't think so.

25

Q You can't be sure to tell the Court it didn't

Dr. Neviaser-cross-Kelner 591

antedate or go back as early as July 5th?

A I can say I am sure.

Q This is in the same general area where you had noted sloughing on June 29th?

A Yes.

Q He had been in the hospital all this time and he hadn't gone down where he might have a fall or anything like that?

A YES sir.

Q Nothing in the record shows that he had any trauma or injury, isn't that so ?

A Yes.

Q Now, how deep was this necrotic area of bone that you drilled at that time?

A Maybe a millimeter.

Q There are a number of drills available to orthopedic surgeons, different sizes, different purposes, different diameters, isn't that true?

A Drill, yes.

Q Some drills are used to make a hole to put a metal rod or pin or nail?

A Yes.

Q On different bones?

A Yes.

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2 Q Some of them have one eighth of an inch diameter,
3 some have one quarter an inch like carpenters drills?

4 A Yes.

5 Q A variety of sizes and purposes?

6 A Yes.

7 Q Did you write down anywhere in this report where
8 it says that the dead bone was cleared away with a hand drill
9 through bleeding bone -- did you write down the dimension
10 of the drill being used to do what the report describes, namely
11 drill through bleeding bone?

12 A In the written operative report it said burred.

13 Q Burring -- withdrawn.

14 Have you ever used a drill say in carpentry?

15 A Yes.

16 Q Are you as handy around the house as I would
17 like to believe I am?

18 A I don't know.

19 Q Have you ever taken a drill primarily intended
20 to make a hole but you wanted to scrape around some of the wood
21 so you can use that drill bit intended to make a hole and
22 go around and scrape around the hole to make it wider?
23 That is burring in such a way?

24 A Not in my way of thinking.

25 Q How deep was the dead bone at that time?

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A About a millimeter.

Q You scrapped it off, burred it off?

A Yes.

Q When you burred it off, some of that dead bone would be flying through the air?

A It is washed out.

Q You later washed it out?

A While you are doing it there is irrigation.

Q What did you irrigate with?

A Saline.

Q What about the soft tissues in that area where the bone was dead, describe their condition?

A (No response.)

Q The record doesn't say anything about that?

A The skin edges were excised.

Q That would be skin up on the surface?

A Yes.

Q From the surface down to the bone you've got some other layers of tissue?

A Yes, some granulation tissue cleaned before the surgery and during the surgery.

Q Any muscle tissue in that area?

A (No response.)

Q Any ligamentous --

1
2 A Maybe some part of the muscle covered by
3 granualation tissue.

4 Q What was the condition of those other sub
5 cutaneous tissues?

6 A From my recollection, they were clean.

7 Q You have no entry in the record on that point,
8 do you?

9 A NO.

10 THE COURT: We will recess for lunch now.

11 (A recess was taken at this time until 2:15
12 this afternoon.)

13 (Continued on the next page.)
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Neviaser-cross/Kelner

THE COURT: All right, Doctor, you may resume the stand.

BY MR. KELNER:

Q Dr. Neviaser, you told us that there was dead bone there, that you used for this drilling or the burring practice. How do you explain the presence of this dead bone, what caused it to be there?

A It was in contact with the area, did not have a periosteal covering, which is the covering around the bone and the blood supply, the blood supply of the superficial bone comes from the periosteum, that is why it became "dead."

Q Did you tell us that is not the site of the fracture, the fracture was below that point, is that correct?

A Yes.

Q So that was the periosteum, the lining or the covering of the bone, the area or the structure which carried the blood supply to that particular site?

MR. RUDOFISKY: Your Honor, which site? The fracture site or --

MR. KELNER: No, the site where there was dead bone found.

A Yes sir.

Q Is that right?

A Yes.

Q So then there was an interruption of the normal blood supply on the surface of the skin and the tissues wuperficially as well as deep down on the bone itself, is that correct?

A Incorrect.

Q Incorrect? Well, didn't you tell us there was an interruption of the blood supply to the soft tissues?

A What I stated was there was an interruption of the blood supply to the skin which died, we removed that so all of the soft tissue left now has a good blood supply. The only thing at the base is a piece of bone or an area that we described previously that is about a millimeter deep and does not have a good supply.

Q But that bone was right under the area where there was dead skin, necrotic tissue?

A But that had been removed, yes sir.

Q Will you please just not add but just answer the questions? That is the same site where there had been death of the tissue due to improper blood supply?

A That is correct.

Q You had stated that there was an incorrect compression, incorrect language with regard to this matter of drilling through the bone or drilling to the bone, I

1
2 don't want to go into that in detail, but assuming that one
3 did what is literally stated in the record, drilled through
4 the bone, through bleeding bone as the record states, that
5 would be improper, wouldn't it?

6 A It would be improper if that is what it
7 stated, but it did not state that.

8 Q Let's read it again, sir.

9 I read from the operative record of July 28,
10 1972, "The bone at the base which was dead was cleared away
11 with a hull drill through the bleeding bone;" is that what
12 it says?

13 A Yes sir.

14 Q You had told us that you meant that to say
15 drilled to the bleeding bone, is that what you said?

16 A Well, we had explained before.

17 Q If one were to drill --

18 A That is not what I explained before, what
19 you just said. I said through bleeding bone to myself
20 meant through bone that was bleeding not all the way through
21 the bone.

22 Q Did you say this morning and, if I misunderstood
23 please correct me, didn't you say by using the word through
24 to you that meant to the bleeding bone?

25 A Correct.

1
2 Q Now my question is, sir, was the bone bleeding?

3 A Yes sir.

4 Q Without having drilled into any part of it?

5 A It was burred down to the bleeding bone, it
6 was not drilled, it was burred.

7 Q Would it be improper to drill through bleeding
8 bone as this record states it but as you say was not your
9 intention to so mean it?

10 A What we have here is cleared away. In no way
11 possible can you use a drill the way that you are describing
12 to clear away.

13 Q That would be improper?

14 A No sir, that is not improper. With a burr
15 you can clear it away, with a drill you cannot.

16 Q I am going to ask you once more and then I
17 will leave this subject.

18 Assuming one were to use a drill and drill
19 "through bleeding bone" as the report states, but as you say
20 it does not mean what it says, would that be improper?

21 A To drill using a drill?

22 Q Yes.

23 A Instead of a burr?

24 Q Right.

25 A All the way through the bleeding bone?

1 Q Yes.

2 A It would be proper.

3 Q Why?

4 A Why? Theoretically then you are placing any
5 foreign material from the burr, I mean not the burr, but the
6 drill that would go into the canal. There is a nail
7 sitting underneath that you could break off to drill on.
8

9 Q Would it also be a source of either causing
10 or spreading infection, either one?

11 A You could.

12 Q That could be a cause of causing infection
13 or spreading of an existing infection if there were one?

14 A That is right, that is why you don't do it.

15 Q By the way, based on your complete analysis
16 of the entire record, when was there first any osteomyelitis
17 of this particular bone?

18 A As far as I was concerned, it would have
19 been the second admission in September, 1972.

20 Q Not before?

21 A I don't believe I mentioned it.

22 Q Well, without mentioning it, without the
23 presence of dead bone which was found on the operation of
24 July 28th, wouldn't that indicate that already at that time
25 there was a breakdown in the structure of the bone itself,

1
2 the beginnings or beyond the beginnings of osteomyelitis?

3 A No sir.

4 Q What is osteomyelitis?

5 A An infection in the bone.

6 Q I think you told us this morning where you
7 have a compound fracture osteomyelitis is one of the things
8 you are to watch out for with regard to diagnosis and
9 treatment, isn't that so?

10 A Yes sir.

11 Q Because if it spreads it can be a dread event
12 in the life of a patient, isn't that so?

13 A I don't understand the word dread.

14 Q Serious.

15 A Life-threatening?

16 Q No, limb-threatening, the loss of a leg which
17 alters the entire life of a human being.

18 A Not necessarily, no sir.

19 Q But isn't it a known hazard, isn't that so,
20 the existence of osteomyelitis because it has a tendency
21 to spread unless properly treated and controlled? Isn't
22 that a fair statement to make?

23 A The osteomyelitis once it is in the bone does
24 not tend to spread, it stays where it is and gives problems
25 such as drainage.

1
2 Q Provided you manage it properly, isn't that
3 so?

4 A No sir.

5 Q You mean if you just leave it alone, don't
6 medicate it with an antibiotic, don't suction or drain it,
7 you expect osteomyelitis to automatically clear itself up?

8 A It does not clear itself up.

9 Q It just stays there?

10 A It remains dormant sometimes for 20 years or
11 more and then drains.

12 Q And sometimes spreads as it did in this case,
13 isn't that so?

14 A I don't know about the infection spreading in
15 this case.

16 Q You are aware that he lost his leg, aren't
17 you?

18 MR. RUDOFISKY: Your Honor, there is no
19 evidence in the case that the infection spread.

20 MR. KELNER: If your Honor pleases, I think
21 we have --

22 MR. RUDOFISKY: I think Dr. Koven indicated
23 that the infection got worse at the site, but we have
24 all --

25 THE COURT: Yes, at the site.

1
2 MR. RUDOFISKY: Yes, but there was no spreading
3 at the infection, it was always at the same site
4 according to Dr. Koven, it got worse.

5 THE COURT: He testified to the degree and
6 intensity of the infection.

7 MR. RUDOFISKY: But he didn't say it spread.

8 BY MR. KELNER:

9 Q Sir, are you aware that an operation was
10 performed called saucerization, not once but twice on this
11 patient?

12 A I was not aware that it was done twice, no sir.

13 Q You weren't?

14 A No sir.

15 Q Have you read through all of these records
16 before you testified?

17 A I don't have any records from the VA or any
18 of the records other than the ones that are sitting here as
19 far as I know that came in contact with me.

20 Q Do you know what saucerization operation is?

21 A Yes. It's actually you saucerize a bone.
22 That means you take off the top of it and open it up and it
23 looks like a saucer; as if a saucer had two saucers on it
24 and you uncovered it. Scrape the bone and try to get the
25 bone as clean as you can, pack it and locally treat it with

Neviaser-cross/Kelner

dressings and antibiotics by mouth or by vein.

Q You never attempted to do anything of that nature while you had this patient?

A Yes sir.

Q I think you said your first contact with this patient was June 29, 1972, and when was the last time you had anything to do with him professionally?

A According to the records, it's December of 1972.

Q Yes.

A My recollection, I am sure, I must have seen him in 1973, but I cannot remember exactly when or where.

Q Now, sir, is it a fact that the first antibiotic given to Mr. Lennon other than Keflex was tetracycline on July 19, 1972?

A Yes sir.

Q Is that right?

A Yes.

Q The culture sensitivity tests that were ordered before July 18, 1972, was ordered on July 5, 1972, is that correct?

A I believe it was well around that period, yes.

Q How long would it take you as the managing orthopedist on a particular case to learn the results of

1
2 that culture sensitivity test? Would say within 24 hours
3 be a fair estimate?

4 A Yes, within 24 hours.

5 Q The report indicates that five days later
6 there was a written finding of three different species of
7 microbes or bacteria, is that right?

8 A Yes.

9 Q That would be on July 11, is that correct?

10 A Yes.

11 Q Did you check with the laboratory even before
12 the written report came through to determine what, if any
13 microbes or strains or species there were?

14 A I don't recall.

15 Q Wouldn't you say that time was of the essence?

16 A No sir.

17 Q Not at all?

18 A No sir.

19 Q Then going back before July the 6th -- withdrawn.

20 Is it clear between us now, there is no dispute
21 about it that from July 6 to July 18 there was no antibiotic
22 given to Bob Lennon?

23 A There was acetic acid which can be considered
24 local antibiotics because it does kill microbes or bacteria.

25 Q I don't mean to be repetitious, but was there

any known designated antibiotic given to this young man other than the soaks and saline solutions?

A No sir.

Q Now, on this slip from the laboratory, I notice there are three different microbes or bacteria species listed, is that correct?

A That is correct.

Q How long before July 6 was any antibiotic of any kind given to him?

A I believe it's either the 25th or the 28th or the 29th and it was discontinued.

Q Would you agree it was July -- I'm sorry, June 25th or June 26th Reflex?

A Yes.

Q Because that had been ordered 10 days earlier and the ten days would have expired on June 26th, is that correct?

A I believe that is correct.

Q Is it clear then between us from June 26 until July 18 there was no antibiotic, a designated antibiotic given to Bob Lennon during that period of time and I am not referring to what you said earlier about the acetic acid soaks?

A What about Betadine, that is a local antibiotic.

Q For washing the surface of the wound, is that correct?

A It does not wash it, it kills bacteria.

Q On the surface?

A Yes sir.

(continued next page)

1
2 Q It's not systematic, it does not get into his
3 whole system as an oral injection would?

4 A Correct.

5 Q Keflex, as I understand it, is an oral tablet
6 that is taken for the whole system, correct?

7 A Correct.

8 Q That is designed to combat strains of bacteria
9 within his whole system not just superficially on the wound?

10 A Well, if it's only in one place, you would
11 be given it for that one place.

12 Q But if there is a subcutaneous under the skin
13 infection of some kind, these tablets are designed to go
14 through his system and not superficially on the skin?

15 A Designed, yes sir.

16 Q That would be the intention, right?

17 A They were designed to that, yes.

18 Q Well, the keflex was given in June for that
19 purpose?

20 A It was given as a prophylactic antibiotic to
21 avoid or to reduce the chance of infection.

22 Q Now, on the 6th of July when this culture
23 sensitivity test was done and these three strains of
24 bacteria were found by microscopic studies, was the keflex
25 intended to combat any and all these three strains?

1
2 A Those three strains were considered contaminants and
3 not necessarily virulent and, therefore, were not given --
4 I mean were given locally since they were just local.

5 Q Starting on July 18th?

6 A No, you are talking about something different.

7 Q I misunderstood you.

8 A Tetracycline.

9 Q That was started on July 18th?

10 A Yes, the reason tetra --

11 Q You are not answering my question. Let me
12 start again:

13 Whenever keflex was given either before July 6th
14 or before July 18th or after July 18th, was the keflex
15 intended to counter or combat these three strains that are
16 listed here?

17 MR. RUDOFISKY: Excuse me, your Honor. I don't
18 have any objection to the witness answering for after July
19 18th when he was managing the case, but he wouldn't
20 know what was intended in June when Doctor Derando was
21 in charge of this case.

22 THE COURT: I would say so.

23 MR. KELNER: I accept that, your Honor.

24 BY MR. KELNER:

25 Q After you came into the case, the keflex

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1
2 which you told us about was given over a period of time
3 after July 18th, is that correct?

4 A No, tetracycline was.

5 Q Wasn't keflex given in September?

6 A Yes.

7 Q Over a period of a number of days, isn't that
8 so?

9 A Yes sir.

10 Q Was the keflex intended to combat these three
11 strains listed in the laboratory report?

12 A No sir.

13 Q Not at all?

14 A No sir.

15 Q What was intended to combat these three strains?

16 A The local application of acetic acid.

17 Q Just superficially on the outside of the wound.

18 A No.

19 Q Nothing systematic?

20 A No sir, except for the tetracycline which was
21 started on the 18th of July.

22 Q How long was tetracycline given to him according
23 to the records?

24 A As long as his stay in the hospital.

25 Q How frequently?

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A 500 milligrams every six hours.

Q When was that ordered?

A January 28th, that is one, but that is a renewal.

Q I want to direct you back to July 18th, 1972, may.

A 500 milligrams 4 times a day for 30 days.

Q Is it renewed after that?

A There was another order for the 28th for 10 days because the 30 days was not up yet but he did have the procedure done, so that would start off for 10 days at that point.

Q Sir --

MR. RUDOFISKY: Your Honor, he has not finished looking through the record.

MR. KELNER: I am sorry.

A That is all.

BY MR. KELNER:

Q So when, according to the records, did the tetracycline finish as far as giving it to the patient was concerned?

A I am looking for the nurse's notes as to when it was discontinued. It was discontinued 8/11/72.

Q August 11, 1972?

A 521

1 A Yes sir.

2 Q Is it a fact that there were any further
3 culture sensitivity tests conducted thereafter to see
4 whether these three strains of bacteria which are stated
5 on the record and I wouldn't repeat all the names of them,
6 I think we both understand what I am talking about, but were
7 there periodic sensitivity tests done thereafter to see if
8 these strains were still there?
9

10 A There were some.

11 Q There were some when?

12 A September 18th, 1972; November 9th, 1972.

13 Q What strains were found on those culture
14 sensitivity tests as being present in Mr. Lennon?

15 A On September 18th, the staphylococcus aureus
16 coagulase was positive.

17
18 On the 9th of November the staphylococcus aureus coagulase
19 was positive only.

20 Q Now, sir, on this
21 that strain was recorded in September, 1972, when the only
22 antibiotic being given was keflex, am I correct in that?

23 A He was on keflex, yes.

24 Q And no other antibiotic?

25 A That is correct.

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Q Were you the one who prescribed the keflex at that time for his then condition?

A Yes sir.

Q Whether you agree or disagree with this statement which is contained in Physicians Desk Reference, a compodium volume put out by the Drug manufacturer of keflex and referring -- I am referring to the product information on page 861 and I quote --

MR. RUDOFISKY: What is the year of that volume?

MR. KELNER: 1972.

For the record I am reading now from Physicians Desk Reference, 1972 edition on keflex, referring to keflex, "It has no activity against psuedomonas or heredos species."

The fact is then he was getting keflex which, according to the manufacturer, had no effectiveness against this strain pseudomonas which is stated in the laboratory report to have been in existence with regard to Mr. Lennon in September of 1972, is that correct sir?

A Yes.

Q Sir, were you aware that the keflex then being given to him had no effectiveness against pseudomonas -- I withdraw that.

Did you ever check with the Physicians's Desk

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Reference to determine the effectiveness of that particular drug against this particular strain of infection that he had in September of 1972?

A I cannot answer that yes or no.

Q Did you know at that time that there was a necessity to check the literature to determine whether a particular medication is effective in combating a particular infection?

A No. We go by the sensitivity tests.

THE COURT: What?

THE WITNESS: The sensitivity of the bug to a certain antibiotic.

BY MR. KELNER: "

Q Well, isn't it known that in the field of microbiology, that is combating particular bacteria of microbes, that some microbes or strains or species are resistant, are not effected by certain medications?

A Yes sir.

Q Isn't it know to the entire medical profession and in 1972, there was a necessity in proper practice and procedure to check particular strains of bacteria against particular drugs to determine the effectiveness of such a drug on such a bacteria?

A That was done then.

1
2 Q Did you know that pseudomonas one of the strains
3 reported by your own laboratory was then stated not to be
4 effected or controllable by keflex? Did you know it then?

5 A Yes sir.

6 Q Did you know that?

7 A Yes sir.

8 Q Well, since you have told us already that is
9 the only medication or antibiotic being given to him, that
10 means this particular strain was running wild and uncontrolled
11 by antibiotics, isn't that a fair statement to make?

12 A No.

13 Q Incidentally, the operation that you performed
14 on July 28th, 1972 was done for what purpose?

15 A To close the wound.

16 Q At that time you already knew from your culture
17 sensitivity tests done on July 5th and reported on July 11th,
18 that there was an underlying condition with three known
19 strains of infection, isn't that so?

20 A Those are skin contaminants, they were not any
21 infections.

22 Q But you knew it as early as July the 11th or
23 you could have known earlier by telephoning the laboratory?

24 A Correct.

25 Q Was there any particular reason why you would

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1
2 have to wait until July 28th to perform the operation which
3 you did then instead of doing it immediately on July 11th?
4

5 A Yes sir.

6 Q What was the reason?

7 A To be sure that the tissues were clean enough
8 so I would not have to explore the wound terrible, a lot,
9 to keep the wound as small as possible and then cover it.

10 Q Well, you could have cleaned it out to the
11 maximum extent and then have gone in there to clean out any
12 necrotic tissue or necrotic bone, couldn't you?

13 MR. RUDOFSKY: Would counsel specify a date?

14 BY MR. KELNER:

15 Q July 11th, 1972.

16 A It was not needed. We were doing it with the
17 soaks.

18 Q Was the wound open or closed at that time?

19 A The area in question was open.

20 Q As a matter of fact, there is a note in the
21 record on July 13th, you could actually see the bone?

22 A That's right.

23 Q Wasn't that a source of further infection?

24 A No sir.

25 Q Yet you waited until July 18th to start giving
the tetracycline, is that right?

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A Right.

Q Was there any reason that the tetracycline couldn't have been given as early as July 7th by telephoning the laboratory to determine what condition the laboratory report showed he had?

A Yes sir.

Q Or July 11th, couldn't you have done it then, yes or no.

A Could have, yes, sir.

Q You were not alarmed about his condition at any time, were you, from the time you came in this case, July 29th, 1972, until you left it in December, 1972? You were not at all alarmed about this boy's condition, is that a fair statement to make?

A No sir, it is not.

Q And the operation which you performed in December, December 13th, 1972, was for what purpose, sir?

A To try to heal the infection in the bone.

(Continued.)

1
2 Q When had the bone become infected?

3 A I think that may be the crux of this entire
4 thing; I don't know when it got infected.

5 Q You were the managing orthopedic surgeon, were
6 you not?

7 A That's correct.

8 Q You are telling this Court you do not know
9 from the records, from your own memory, you observations,
10 your experience, you do not know when this bone became
11 infected?

12 A The date it became infected? No sir.

13 Q Well, can you pinpoint the week or the month?

14 A I gave this testimony already; it would be
15 approximately the second admission in September of 1972.

16 Q September?

17 A Yes.

18 Q You were already giving tetracycline in July to
19 combat infection, is that right?

20 A Yes.

21 Q You say as far as you are concerned there
22 definitely was infection in September of 1972 of the bone,
23 is that correct?

24 A Yes.

25 Q In July you were already giving tetracycline

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1 because of an infectious process, isn't that true?

2 A No sir, we were giving tetracycline for the
3 possibility of avoiding infection in the bone because
4 tetracycline itself is one of the few antibiotics absorbed
5 into the bone, where others aren't.

6 Q The fact is in December 1972, you installed
7 the hoses or the tubes for such irrigation?

8 A Yes.

9 Q If you knew in September for sure that there
10 was infection of the bone, you could have instituted irrigation
11 suction in September of 1972, instead of waiting another 3
12 months until December 13th, 1972, could you not have done
13 that?

14 A No sir.

15 Q Because you were afraid you might interrupt
16 the union of the bone itself, is that why?

17 A And cause instability.

18 Q And cause instability? But the fact is when you
19 saw open bone on July 13, it was visible at that time through
20 an open wound in the leg, is that right?

21 A Yes sir, no where the fracture site.

22 Q Is it a fact on September 1st, there was still
23 non-union of the bone?

24 A September 18th, yes sir.

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3
1
2 Q And also September 1st? Doctor, before you look
3 at that, didn't you tell us this morning that your impression
4 on September 18 of non union was an incorrect impression
5 in that it was a wrong impression?
6

7 A There was no union at that time.

8 Q There was no union?

9 A Correct.

10 Q In September?

11 A Correct.

12 Q September 18th, but didn't you answer to a
13 question by counsel here, didn't you say that that note
14 which was read at that time, I believe, and if you would like
15 to look at it, would you read it to us please?

16 A Where are you --

17 Q On the 9th and the 18th signed by you, sir.
18 Well, this is a copy I am showing counsel, if you can read
19 it to us?

20 THE COURT: What exhibit is that?

21 MR. KELNER: This is exhibit number two.

22 A Now probable infected non union right tibia section.

23 Q Now probable infected non union right tibia
24 fracture?

25 A Right, there is no union.

Q I hope you will pardon me, but in answer to a

1
2 question by counsel here this morning, didn't you say that that
3 impression was wrong?

4 A That is correct.

5 Q What did you mean by saying this morning it was
6 wrong? This note that you wrote in your own handwriting?

7 A It's semantics, in orthopedics one would believe
8 that a non union of a fracture is a fracture with no union
9 over the period of time that one would expect that fracture
10 to heal.

11 Q I confess to you that I don't understand you.
12 Will you try to make it clear to me as a layman. Was this
13 bone fracture site a non union fracture site at that time,
14 yes or no?

15 A It did not have any union at that time, that
16 is correct.

17 Q Then what was wrong about -- isn't that what
18 you wrote, that On September 18th, in your own handwriting,
19 that there was a non union there?

20 A The question did not ask me was there a non
21 union.

22 Q What was wrong about this note?

23 A Because --

24 Q You told us this morning it was wrong.

25 A Because it went ahead and healed within 3

1
2 months from that note. It could not have been a non union
3 I was obviously wrong.

4 Q You were wrong?

5 A That's right.

6 Q Had the bone already formed a union there?

7 A On September 18th, no.

8 Q In other words, as of that date do we agree now
9 that although there was a union later as of that date there
10 was a non union?

11 A As of that date there was a non union, correct.

12 Q Did you write the same thing on September 1st,
13 in substance? If you would like to look at it under doctor's
14 progress note in exhibit number one, cannot tolerate cast;
15 that is referring to Mr. Lennon?

16 A Yes.

17 Q Long leg -- I am sorry.

18 A Long leg cast.

19 Q Bed rest, probable infected non union with
20 drainage from wound, two area from wound and two areas below,
21 is that what you wrote on that date?

22 A Yes.

23 Q So that in September this was draining and there
24 was non union, September 1st, and again confirmed at a later
25 date of September 18th, is that correct?

A Yes sir.

A There was non union, correct.

Q And draining, right?

A And draining, correct.

Q And pain and inability because the pain to stand the cast on there, is that right?

A I don't know whether it is pain at the fracture site or just a cast that made him uncomfortable.

Q You told us that you had a desire not to do any thing that might affect the formation of a union of the fractured area, is that right?

A Yes.

Q But since there had been no union from June 9, 1972, when the metal rod was installed on the first surgery on the day of the accident, until September 18th, more than 3 months later, still non union, was there any thing at all that made it inadvisable for you to during that entire time to install a suction or draining equipment so that you could get down to the area where this bone was the subject of the compound fracture?

A You'll have to explain that question again.

1
2 Q From September 9th when there was non union
3 because of the fractured bone to September 18th, when there
4 was still non union, during that interval of time, June 9th
5 to September 18th, did you ever institute a suction and drainage
6 technique?

7 A No sir.

8 Q You waited until December to do that?

9 A Yes.

10 Q By that time you had osteomyelitis in that area,
11 sh'n't that so?

12 A Yes sir.

13 Q You told us you don't know when that began but
14 you have certain opinions, is that correct?

15 A Correct.

16 Q This suction and drainage method was it effective
17 at all when it finally was instituted?

18 A For a short period of time.

19 Q By that time there had been a spread or a
20 generalized osteomyelitis of this young man's leg bone, the
21 tibia?

22 A No, that is not true.

23 Q What was the extent of the osteomyelitis by
24 December, 1972, if you can tell us?

25 A It was very difficult actually to tell in

1
2 December. The fracture was healed and there was no real
3 bona fide x ray evidence of an area of infection, however,
4 he was draining, and therefore, one would have to surmise
5 that he did have osteomyelitis in the fracture site and
6 no where else in that bone.

7 Q Did you look at xrays that were taken at or
8 about that time?

9 A Yes sir.

10 Q Didn't they show that the bone looked like
11 any thing but healthy union in the bone?

12 A It looked like it was united and there was
13 no evidence that I could not take that nail because once
14 it was united it did not have that stability.

15 Q Going back from June to September, since you
16 still had non union in September, your failure to install
17 suction and drainage in that time could have had very little
18 effect because 3 months had gone by anyway without union
19 you could have put it in during that time?

20 A No.

21 Q Without any hazard at all?

22 A No sir.

23 Q But you did it in December, you elected to wait
24 until December when the osteomyelitis had already set in and
25 you say there was a union of the bone, is that what you are

1
2 saying to us?

3 A We are saying that it is true and there is
4 evidence of osteomyelitis in September.

5 Q By the way, were you sufficiently knowledgable
6 about the use of keflex concerning how long it is proper to
7 continue using it?

8 A You can use keflex as long as you can follow
9 the patient and make sure he has no side effects from it.

10 Q Side effect?

11 A Yes.

12 Q Is it possible that the prolonged use of it
13 may cause or may result in the growth or introduction of
14 other organisms?

15 A That is correct. In a sense what it can do
16 is essentially have overgrowth of other organisms and a
17 change of that organism that you are treating, if you give
18 it too long.

19 Q How long is too long to use keflex?

20 A Until I would guess you would see a change in
21 the organism.

22 Q Well, you can only know if there is a change
23 in the organism by doing continued culture tests, isn't
24 that so?

25 A Yes.

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Q Tell us how periodically, how frequently culture tests were done starting July 28th, all the way up to December?

A There is an obvious paucity in the records.

Q Meaning hardly any done.

A On the record.

Q On the record and on the record sir will you agree that if there are culture sensitivity tests done any one reviewing that record must rely on the fact that it will be recorded?

A If he is reviewing the record only, yes sir.

Q Yes, well, are you saying to us, sir, that -- withdrawn.

Is it required, proper, standard, procedure, that when you do a culture sensitivity test that it will be recorded and entrys made as to what organisms have been found?

A _That is proper.

Q Right, and, if culture sensitivity tests are done and it is not recorded, the converse of that proposition is so, that it would be improper not to record it?

A Yes.

Q Now, tell us, how many culture sensitivity tests were there done from June 29th when you first came into this case until December?

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Look at the records, please, and take your time?

A Well, as far as I can see, I have done over
4 cultures.

Q What?

A 4 or 5 cultures.

Q Give us the dates of them on the actual record.

A There is one that you have there, July --

Q July 5th? And recorded July 11th?

A Yes. There is one on July 20th.

Q YEs.

A And September and one in December.

Q You refer to that as a paucity, meaning a
scarcity of culture sensitivity tests?

A Requests, yes sir.

Q Are you implying to this Court that other
culture sensitivity tests were done and not recorded?

A It is my recollection that I did more than
4.

Q Than they would have to be recorded, wouldn't
they, by the laboratory or by you?

A It would be proper procedure to report them,
yes sir.

Q You only find how many?

A 4.

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3 Q 4?

4 A Yes.

5 Q Would you agree that if there were only 4
6 culture sensitivity tests done during this prolonged period
7 of giving keflex, just assume this hypothetically, assuming
8 it that keflex was given over a prolonged period of time and
9 that there was not a corresponding periodic frequent number
10 of culture sensitivity tests done, wouldn't you say that
11 would be contrary to proper practice?

12 A I cannot answer that question; you will have
13 to be a little more specific.

14 Q I shall.

15 (Continued.)
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Q I shall.

Is it a fact that Keflex was given on September 18th? Would you correct me if I am inaccurate? I think that is Exhibit 2.

A That is correct.

Q Keflex was ordered to be given for fifteen days starting September 18; is that correct?

A Yes, sir.

Q Was there a culture sensitivity test started at that time, during that period of 15 days?

A There was one on September 18th--

Q That would take care of the first day, but none for the next 15 days; is that correct?

A Yes, sir.

Q When is the next culture sensitivity test done?

A In November.

Q November?

A Yes.

Q From September 18 to November what? was there no culture test?

A None reported until November 9.

Q Sir, do you agree or disagree with this statement -- I am again reading with regard to Keflex from

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the same volume, Physician's Desk Reference, manufacturer's own reference book, referring to Keflex:

"Culture and susceptibility test should be initiated prior to and during therapy."

Do you agree with that?

A Yes, sir.

Q That was not done in this case, was it, sir?

A Yes, sir.

Q During this therapy of September 18th and for the next 15 days?

A It didn't say that there.

Q Let me read it:

"Culture and susceptibility test should be initiated prior to and during therapy."

Was that done in this case during those 15 days?

A It was done in November, still on Keflex.

Q You mean from September 18 to November--

A As far as I recollect, he should have been on it.

Q You already told us there was no culture test during September 18th to November--

A That is correct, November 9th.

Q To that extent, from September 18th to November

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9th, that would not be in compliance with the manufacturer's instructions concerning what to do; isn't that so?

A It was continued on Keflex through his next hospitalization and cultures were done.

Q That would not be doing the culture test during the therapy for two months?

A Continued through the entire time.

Q I beg your pardon?

A His therapy of Keflex continued through the entire time.

Q But, I read this and I will read it to you again, sir, and I don't want to fence with you, where the book of the manufacturer says:

"Culture and susceptibility test should be initiated prior to and during therapy."

And that was not done during the term from September 18 to November 9, according to the record.

A It was done November 9, which is part of the therapy.

Q Not during that therapeutic period from September to November 9, according to the record.

A According to the record.

Q That's all I'm asking. That is contrary to the manufacturers's admonition to do it and keep doing it

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for a reason; isn't that correct?

A No, sir.

Q Do you agree or disagree with this statement,
"Prolonged use of Keflex may result in
the overgrowth of nonsusceptible organisms."

Do you agree with that?

A Yes, sir.

Q So that how prolonged was this use of Keflex,
which I believe you said was prescribed September 18, 1972,
for fifteen days-- is the next day October 3, 1972, when it
was again prescribed?

A That is correct.

Q Was it on that day, for fourteen days to con-
tinue?

A That is correct.

Q That makes 29 days; is that correct?

A Yes.

Q I missed the next day. Would you be kind enough
to tell me if it was October 18th?

On October 18th for another 14 days?

A Yes, sir.

Q Is that correct?

A Yes.

Q Is the next day November 15th for fourteen

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days?

A (No response.)

Q Do you have that?

A I'm sorry, I thought you were reading from the chart.

Q I asked you to assume my associate took the dates down correctly, and if they are not, correct us.

The next one is November 29, for a period of 15 days, and then December 13th, without any number of days having been recorded by us while you were testifying.

Maybe you can give it to us now.

How long was that period of Keflex prescribed for?

A Fifteen days, 11/29, 12/13 is intravenously for two days.

Q So, sir, we add up by simple addition to 74 days of Keflex. And coming back to the manufacturer's -- the drug manufacturer's statement,

"Prolonged use of Keflex might result in the overgrowth of nonsusceptible organisms."

That means there may be other strains of bacteria which would not be controllable by treatment of Keflex; is that what that means?

A Yes.

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Q After the November 9th culture test, when was the next one given?

A December 13th. There was one November 6th also. I missed that one.

Q Sir, in stating this was a paucity, which I am translating the word as a scarcity, if there were only four culture tests done from January 29 until December, that would not be adequately or sufficiently frequent in relation to the statement or instruction of the manufacturer, namely,

"Cultures and susceptibility test should be initiated prior to and during therapy, and prolonged use of Keflex may result in the overgrowth of nonsusceptible organisms. Careful observation of the patient is essential; if superinfection occurs during therapy, appropriate measures should be taken."

Do you agree with all of that?

A You are going to have to read that back again.

Q Do you agree with everything I just read, which is contained in the manufacturer's Physicians' Desk Reference for the Guidance of Doctors?

A Yes, sir.

1
2 Q When you referred to the paucity of culture
3 sensitivity tests, is it fair to say that there should
4 have been more than four tests during all this prolonged
5 period of use of Reflex?

6 A Actually, in osteomyelitis that is probably
7 sufficient, because the bug doesn't change that often.

8 Q Did the bug change here?

9 A No, sir, it was a staphylococcus aureus from
10 September 18 to December 13.

11 Q Sir, when you describe the word "paucity"
12 did it not indicate that you had the opinion there was
13 more than four done, but it is not recorded there?

14 A That is correct.

15 Q Did that not also imply you felt more should
16 have been done under all the conditions of this prolonged
17 treatment?

18 A Not necessarily, no, sir.

19 Q By the way, the necessity for having sterile
20 dressings and changes and cleaning, is that one of the
21 essentials in management of infection and prevention of
22 infection?

23 A Prevention of infection.

24 Q How about management of infections?

25 A (No response.)

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Q Once it's there.

A Sterile dressing?

Q Yes.

A Yes, sir.

Q When was there first an infection? July 6th,
when you found pus?

A Superficial infection.

Q An infection?

A Yes.

Q Is it a fact that you at various times and
other people at the hospital told Mr. Lennon that he him-
self could change dressings both in the hospital and when
he could go home?

A Starting August 14, 1972, yes, sir.

Q What were the instructions to him about per-
mitting him to do his own changing of dressings?

A We showed him how to do them on the ward when
transferred down to B-1 on August 14th. He was instructed
how to do it himself.

Q Did he have medical training?

A He was instructed by us, yes, sir.

Q In effect, you were instructing him in proper
medical procedure to handle an infected wound?

A We did that with many patients, yes, sir.

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Q Didn't you have nurses on duty trained for such--

A Before that period of time we had them on the ward and they did it.

Q Did you have nurses there from August 1972 to December?

A Not on B-1.

Q There were nurses available to change dressings for infected patients?

A Yes, sir.

Q How about doctors? Weren't you around there from January 29th to December?

A That's correct.

Q Did you ever change a dressing for a patient who had a painful wound complaining of pain, drainage, open wound, bone visible through the open wound? Did you ever change a dressing, sir?

MR. RUDOFISKY: First of all, I have two objections. No. 1, I think we ought to tie this down to the period Mr. Lennon was in this sort of halfway ward, the B-1 ward, which was from the middle of August until September 18th's readmission.

And, No. 2, I object very much to the characterization that the bone was visible.

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The only testimony is sometime in July, and apparently there is no suggestion that the doctor wasn't available--

MR. KELNER: May I answer that.

Q Wasn't this wound draining on September 1st?

A Yes, sir.

MR. RUDOFISKY: I don't object to the characterization of drainage, it's just that you said the bone was visible.

THE COURT: It was visible at some time.

Q The bone was visible on July 13th?

A True. At the time it was skin-grafted.

Q After the skin graft, did it keep draining?

A The drainage continued through a small opening in the wound.

Q Draining and open until finally you decided to go in in September to do a suction?

A It drained through one area through the inferior portion of the wound.

Q In August, is it a fact that you were directing or permitting or instructing Mr. Leonard to do his own changes of dressing on a wound like that?

A That is correct. Many osteomyelitis patients do it.

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2 Q He had osteomyelitis in August?

3 A No, sir.

4 Q He did not?

5 A No.

6 Q Assuming that Dr. Koven, an orthopedic
7 surgeon of many years of experience, had informed this
8 Court that by July 6, 1972, this osteomyelitis process
9 was already in movement, and that the attending physicians
10 should have gone in at that time, cleaned out any necrotic
11 tissue, and installed suction drainage at that time. Is
12 that an acceptable opinion that you would say you would
13 be in conformity with as proper practice?

14 A In this case, no, sir.

15 (Continued on the next page.)
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2 Q You said that permitting the patient to change
3 his own dressing starting August 2d, 1972, and continuing
4 on periodically, would be proper practice, is that correct?

5 A It wasn't August 2d.

6 Q It wasn't?

7 A No.

8 Q I'm sorry.

9 THE COURT: When was it?

10 THE WITNESS: August 14th.

11 THE COURT: August 14th.

12 MR. KELNER: Excuse me, your Honor.

13 (Pause.)

14 Q I read this to you, sir, and see if I am reading
15 correctly -- August 2d, P.M. --

16 A Self dressing change.

17 Q That means by the patient, doesn't it?

18 A Yes.

19 Q That's only how many days after your operation,
20 July 28th was it?

21 A The 29th.

22 Q So that is around 4 days after you got the
23 patient changing his own dressing?

24 A I don't.

25 Q Who does?

1 A Whoever signed that.

2 Q Was it improper for anybody in the hospital to
3 have a patient change his own dressing 4 days after this
4 operation you described?
5

6 A What was the question?

7 Q Was it improper practice 4 days after an
8 operation which you described, I don't want to repeat, on
9 July 28th, I think it was, 1972, to permit the patient to
10 change his own dressing?

11 A It was not ordered.

12 Q Of course it would be improper for a patient
13 who is a layman and not trained and presumably not sterile
14 to avoid infection to be doing that ?

15 A I did not order it.

16 Q I am not blaming you.

17 A The corpsman may have instructed him how to do
18 it. He had instructions also.

19 But not from me.

20 Q Tell us what is required to be sterile to
21 approach an operative area 4 days after it occurs, to be
22 sterile from the medical standpoint, to perform such a function
23 on an open wound which is subject to surgery?

24 A Gloves and sterile dressing.

25 Q Should that be done in a patient's own bed?

552

1 A Many times it is, yes sir.

2 Q By a patient himself?

3 A No sir.

4 Q It shouldn't be done by anybody without gloves,
5 is that right?

6 A That is right.

7 Q Why?

8 A Well, the placing of the infection in the
9 wound by using non sterile applicants can be a part of the
10 reason.

11 Q This is in the nurse's notes, is that correct?

12 A Yes.

13 Q Would you agree with me -- I don't want to
14 prolong our examination -- is it a fact that periodically
15 thereafter you have similar entries of the patient changing
16 his dressing from that day on?

17 A Yes.

18 Q How frequently did you visit this patient,
19 say the month of August?

20 A I tried to see the patient every day.

21 Q When you visited a patient, don't you always,
22 not sometimes -- but always read the nurse's notes to see
23 how he's been doing during your absence?

24 A Well, you've got to go home, you've got to have
25 dinner and you've even got to have a day off. No sir.

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Q Do you catch up on what has been happening?

A Yes.

Q Are you telling this court you don't customarily read nurse's notes to determine the condition of the patient and how he has been faring during your absence?

A Not always.

Q Proper practice requires you to read the record and the nurses notes for the purpose of keeping up with his condition, isn't that a fair statement?

A No sir.

Q What are the nurses notes for, are they for the nurse's benefit or for the doctor in charge of the patient, looking out for the patient's future and health and welfare?

A The nurses have three shifts and they place down what they do during that period of time. They explain every thing they did to the nurse in charge.

The doctor goes around the next day with the chart and nurses notes. She reads from that telling the doctor what is going on.

The doctor doesn't have to read it necessarily.

Q By proper procedure does it require that the Doctor know what is in there?

1 A I am told that by the nurses.

2 Q Did the nurse read to you August 2d this young
3 man was doing his own dressing changing?

4 A I don't recollect.

5 Q If you had been told that or read that you
6 would have prohibited that?

7 A Yes.

8 Q It is improper from a medical treatment
9 standpoint for the patient to do all of those things, isn't
10 that so, yes or no?

11 A Not necessarily.

12 Q I am going to ask you, where you have a
13 compound fracture with an opening to the outer air, which
14 I think you told the Court is an hazard or source of possible
15 infection by introduction of microbes or bacteria into the
16 open wound, is that correct?

17 A Yes.

18 Q With one of the fears that there could be
19 infection or infecting the bone itself like osteomyelitis,
20 isn't that true?

21 A Yes sir.

22 Q Isn't it terribly important to have prompt
23 therapeutic agencies to combat or prevent infection?

24 MR. RUDOFISKY: Counsel, specifically what
25

Neviaser-cross-Kelner

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1 point are you referring to?

2 Q As soon as the fracture occurs.

3 A What therapeutic agent are you talking about?

4 Q Would you agree or disagree with this statement,
5 and I am reading from a medical book, the Merck's manual --
6 you've heard of this book?

7 A Yes.

8 Q Would you agree with this statement, sir:
9 "with the employment of chemo therapy many of the infections
10 which were precures of osteomyelitis are overcome so promptly
11 and effectively that bone infection is prevented," do you
12 agree with that, sir?

13 A In what instance are we talking about?

14 Q Talking about --

15 A Surgery?

16 Q A compound fracture, sir, and the relation to
17 osteomyelitis?

18 MR. RUDOFKY: Your Honor, I think counsel will
19 have to be more specific. This is the same --

20 MR. KELNER: Let me --

21 MR. RUDOFKY: The compound fracture is early
22 in June. The witness testified there was osteomyelitis
23 in September.

24 The record also indicates you did have
25

1 prophylactic antibiotics for two weeks after the compound
2 fracture.

3 MR. KELNER: May I be heard to clarify this?

4 The court has heard Doctor Koven's testimony which is
5 sharply different from this witness.

6 He stated as early as July 5, when pus was found,
7 and June 29th, when nothing occurred and later there was
8 an infectious process setting in, and he has testified,
9 and your Honor will have to make a determination, as early
10 as that time which should have been aggressive antibiotic
11 therapy and suction and irrigation -- I don't want to repeat
12 everything -- but to get in contact with these questions,
13 first let me come back and I think I can clarify this and
14 save time.

15 I am reading: "infection may reach the bone
16 either by the hemogenic routes or directly as in a compound
17 fracture or other trauma, " do you agree with that?

18 A Yes sir.

19 Q Then, coming further, there is local necrosis
20 of tissue which soon spreads if the center of infection is
21 near the surface, the exudate which could be pus, is that ¹/₂
22 right?

23 A Could be.

24 Q May break through and form a subperiosteal
25 abcess, that is the lining or covering of the bone?

1
2 A May I clarify something? You are talking about
3 hematogenous osteomyelitis from what I can understand.

4 Q I present it to you by reading this, as in a
5 compound fracture or other trauma or hematogenic --

6 A That is correct, that is completely different
7 from what you are talking about here.

8 Q But the other one is not different? The
9 compound fracture of the bone, do you agree with that?

10 A No, that is the same. What you are talking about
11 in the second statement is hematogenous and not from the
12 fracture.

13 MR. RUDOFISKY: I want to object.

14 MR. KELNER: I will withdraw that question.

15 MR. RUDOFISKY: I want to have a continuing
16 objection then to counsel's continuing suggestion that
17 this is a compound fracture case.

18 I don't dispute that Mr. Lennon's initial
19 injury was compound fracture but it is a significant
20 issue to be resolved by the Court as to whether this
21 infectious process, when it set in, had something to
22 do with that compound fracture and whether it arose
23 originally from that or whether this infectious
24 process did not have something to do with that.

25 THE COURT: Or from improper treatment. We

1
2 start off with there was a compound fracture. We also
3 know there is treatment for the fracture. There was
4 an infection that eventually set in.

5 The only proper question for the Court is
6 whether or not there was proper treatment rendered
7 so he would not have lost his leg.

8 We can go on for another 35 years and I will
9 never change my position on that.

10 MR. KELNER: This is what I am attempting to do.

11 Q Let me read it: "delay in treatment militates
12 greatly against aborting the infection because as soon as
13 necrosis of bone takes place the anti microbial agent --"
14 which would be antibiotics, right?

15 A Yes.

16 Q "-- cannot reach the dead bone and combat the
17 organism in it." Do you agree with that?

18 A I agree with the statement. The treatment does
19 what, I don't understand.

20 (continued.)
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22
23
24
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Nevaiser-cross/Kelner

MP#2/3

1
2 Q It refers to delay in treatment, sir, do you
3 agree with the statement?

4 A I agree with the statement. I can't under-
5 stand what you are talking about. In the treatment of what?

6 Q Sir, this is under "Osteomyelitis." This
7 entire section of this treatise deals with that, and I am
8 only going to read a few short excerpts from the pages.

9 "Immobilization of the infected bone by
10 plaster or traction is indicated until all evidence
11 of active infection has disappeared, after which
12 early motion is desirable."

13 Do you agree with that?

14 A Yes.

15 Q Sir, would permitting this young man to walk
16 with a walking cast be immobilization as contemplated by
17 that statement?

18 A Yes, his fracture was immobilized by the
19 rod and cast.

20 Q While there was nonunion, was it proper to
21 permit him to walk about, in your opinion?

22 A Yes, sir.

23 Q I'll read this statement:

24 "If an abscess has formed, it should be
25 evacuated and culture made in order to identify the
organism and determine its sensitivity to various

1 antibiotics."

2 Do you agree with that?

3 A If it was found, yes, sir.

4 Q It is advisable to incise and drain early
5 in order to prevent the destruction of bone by the
6 enzymes and pus?

7 A Taking that statement out of context, I can't
8 agree or disagree.

9 Q Is there a substance called enzymes and pus?

10 A From the bacteria there are, and other
11 bacteria there aren't.

12 Q In the particular pus noted here on July 5th
13 and 6th, 1972, would you suspect that would have enzymes,
14 which is destructive to a bone structure?

15 A Probably not.

16 Q You are not sure?

17 A I am as sure as I can possibly be.

18 Q Do you agree with this:

19 "In such a situation concerning delay in
20 treatment, much less harm can be done by incision
21 and drainage in doubtful cases than by delaying
22 this procedure too long, even if you have non-
23 union where there is a showing of pus and drainage
24 and open wound with the bone visible."
25

Neviaser-cross/Kelner

Would you agree that much less harm can be done by incision and drainage than by delaying the procedure?

A I don't agree with that.

Q Do you agree with this:

Only two more, your Honor.

"The basic principles in the treatment of the now rarer chronic case, wide exposure through removal of dead bone, immobilization, and the use of an antibiotic to which the organism is sensitive, to prevent the spread of infection and to sterilize the remaining viable bone..."

Do you agree with that?

A In this case, no, sir.

Q By the way, you say, "in this case, no." Have you found it to be a fact that doctors of equal experience and equal ability and honesty will disagree with each other's opinions?

A Yes, sir.

Q Did you obtain a consultation with any specialist who had greater number of years of experience than you did in 1972?

A Dr. Cooper, the captain, had many more years of experience. He was there and knew Bob very well and knew the case.

Neviaser-cross/Kelner

1
2 Q Is there a single entry of a consultation
3 with Dr. Cooper concerning what you were doing in relation
4 to the various steps in the treatment that we have been
5 discussing?

6 A Consultation request, no, I think he would
7 be involved.

8 Q This was your patient, not his?

9 A Yes.

10 Q At that time, you were not a diplomate or
11 certified specialist?

12 A I passed the Board examination in 1972 during
13 the period he had his problem.

14 Q When were you certified as a diplomate?

15 A September, 1972.

16 Q September, 1972?

17 A Yes.

18 Q You had been there that one year that you
19 told us about?

20 A Yes.

21 Q Dr. Cooper, was he the only orthopedic
22 surgeon there with the amount of experience superior to your
23 own at that time?

24 A Yes.

25 Q How many patients were there under his

4
563

jurisdiction or tutelage?

A (no response.)

Q Quite a few?

A Two hundred, 150, 200 people.

Q So that the steps that were taken in treating Mr. Lennon were primarily your responsibility at that time?

A Yes.

Q Because he couldn't conceivably watch hour to hour or day to day the progress of every patient?

A Nor could I'.

Q How many patients did you have?

A Maybe fifty or sixty.

Q How many orthopedists were there?

A Four.

Q Four of you?

A Yes.

Q Were you the youngest in terms of experience?

A There were three of us who had about the same experience and then Dr. Cooper.

Q I take it he didn't visit these patients frequently except on emergency or special situations?

A No, sir, he had his own patients and he would be on the ward daily.

Q To your knowledge, did he ever come to see

Nevlaser-cross/Kelner

Mr. Lennon concerning any of the flareups, drainage--

A I can't recollect exactly being at the bed, but I saw him--

Q I am talking about looking at the condition and giving advice concerning it.

A Yes, sir, there are times, because almost every week or bimonthly we had rounds with all orthopedic surgeons, involving all the cases on the ward.

Q You don't recall specifically he actually examined and advised concerning therapy in Mr. Lennon's case?

A Yes, every two weeks or so, Bob was there, we discussed his case.

Q You would say to him, "Here is what I am doing," and if he thought it was all right, he would say, to you, "Do what you are doing"?

A Yes, sir.

Q Do you agree with this last statement:
"In all cases in which a culture can be obtained, sensitivity tests should be made with respect to several antibiotics, the sensitivity of the organism to the antibiotic should be tested periodically, since it may become resistant during treatment"?

A Yes.

Neviaser-cross/Kelner

Q Was anything like that done to determine whether or not this condition was starting to become resistant to the Keflex?

A No. We had four cultures, each one of them showing a different bug, but does not show a change in one specific bacteria.

(Pause)

MR. KELNER: I am nearly through, your Honor.

Q By the way, in looking at Plaintiff's Exhibit 2, under final diagnosis, discharge October 24, 1972, was the final diagnosis "probable infected nonunion of right open fracture tibia"?

A Yes, sir.

Q And that, in essence, was stating there was osteomyelitis of this tibia; isn't that so?

A There probably was.

Q Probably?

A Yes, sir.

Q You yourself dictated that report, did you not?

A Yes, sir.

Q As of that time, October 1972, nonunion and probable infection, would you tell us with reasonable medical certainty whether proper medical procedure would have

Neviaser-cross/Kelner

1 justified installing the suction and irrigation technique
2 at that time, in October, instead of waiting?
3

4 A If it were proper, I would have done it.

5 Q I didn't ask you that. I am asking you:
6 Given the situation of nonunion which you told us back in
7 July, back in July, was a reason for not opening up the
8 wound to install suction irrigation because of your fear
9 of causing infection or nonunion--

10 A Yes.

11 Q Jumping to October, where you still had non-
12 union and probable infection, since now you've gone from
13 July to October, four months, would you not have justified
14 installing irrigation and suction?

15 A No. Four months is not very long for a
16 fractured tibia to heal. It takes much longer.

17 Q You had a progressive condition in October,
18 didn't you?

19 A I don't believe it was a progressive condi-
20 tion. It was a localized fracture area, to one or two
21 areas, around the midportion of the tibia.

22 There was no fever, no elevated white count,
23 no sweat at night--

24 Q But it was probably infected, according to
25 your own report?

Neviaser-cross/Kelner

A Yes.

Q You wrote that and signed it?

A Yes.

Q Did you talk to Dr. Cooper on how you ought to be managing this condition, he being more experienced than you in November of 1972?

A Several times.

Q He said this was proper, to let it go on this way without suction and irrigation?

A If he felt it was improper, he certainly had a reason to change the therapy.

MR. KELNER: I have no further questions, your Honor.

THE COURT: We will take a short recess.

MR. RUDOFISKY: I think we can do it quickly.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. RUDOFISKY:

Q Dr. Neviaser, I don't want to belabor the point. I want to understand what you did on July 28th when you burred the bone using the Hall drill.

MR. KELNER: Your Honor, I suggest this is improper redirect examination. He's been over that and it is repetitious.

Neviaser-redirect/Rudofsky

THE COURT: It's probably going to be one question.

Q Let's make sure we understand.

THE COURT: I understand. He didn't drill through it, he burred it. He cleaned the top of the bone with the instrument he had.

MR. RUDOFSKY: Very good.

THE COURT: Is that right, putting it in layman's language?

THE WITNESS: Yes, sir.

Q Doctor Nevaizer, at any time during his hospitalization at St. Albans, did Mr. Lennon show signs of having any infection or bacteria or diseased organism that was resistant to Keflex?

A (No response)

Q If you recall, based on the record.

In other words, you were giving him Keflex during this entire period.

A There were some organisms. Right off the top of my head, I think one was sensitive at the beginning.

Q You mean by the beginning, July 6th?

A Yes.

Q Mr. Kelner made the point about giving him Keflex for 74 or some days in the fall and winter of 1972.

Neviaser-redirect/Rudofsky

Is there any evidence in the record that Mr. Lennon became resistant to Keflex?

A The staphylococcus organism could remain sensitive to Keflex -- cephalotisin -- c-e-p-h-a-l-o-t-i-s-i-n, I think it is.

Q Throughout the period?

A Yes, sir.

Q Is it your understanding that nonunion -- is that a typical term, a term of art?

A Yes.

Q What today, based on your experience to date, what do you understand a nonunion to be?

A In the orthopedic field a nonunion of a fracture is a fracture that does not unite in the usual customary time that that fracture would usually unite.

Did I make myself understood?

THE COURT: I understand.

THE WITNESS: If it took six months for a tibia to normally heal and after six months it wasn't, it is called nonunion.

THE COURT: O.K.

(Continued on the next page.)

Neviaser-redirect/Rudofsky

MP#2/4

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Q To the best of your understanding, what is the normal healing time for a tibial fracture, particularly the kind Mr. Lennon suffered?

A Open type of fracture, probably anywhere from nine to eighteen months.

THE COURT: Depending on the health of the patient?

The range depends on the health of the patient, doesn't it?

The minimum time would be applicable--

THE WITNESS: No, I've seen healthy patients take--

THE COURT: Well, if he starts running around the block and doesn't do what he is supposed to--

THE WITNESS: That is not true. You can have eighteen months to heal a fracture in a healthy person. A good friend of mine--

THE COURT: It would take that long?

THE WITNESS: Yes.

THE COURT: Nature itself takes that long?

THE WITNESS: Yes.

THE COURT: Then that is not a healthy bone.

Q Forgetting the minimum and maximum, a person of Mr. Lennon's overall physical condition, with his bones,

Neviaser-redirect/Rudofsky

what would have been the minimum expected time of his fracture to heal?

A Nine months.

Q September and October records that have been referred to, these were four and five months after the fracture?

A Yes, sir.

Q You did use the term nonunion?

A Yes.

Q You used it in the report that I referred you to on direct examination and used it in the two additional instances where Mr. Kelner pointed it out?

A Yes.

Q In the simplest language you can explain, what is meant when you use that term?

A There was no union.

Q Would you have expected there to be union by that time, four or five months after the initial fracture?

A That would be approximately three months after the fracture, no, sir.

THE COURT: You expected a healing process?

THE WITNESS: New bone-- not on an open fracture.

Neviaser-redirect/Rudofsky

1 THE COURT: You wouldn't expect to see some
2 type of healing?

3 THE WITNESS: New bone in an open fracture
4 three months, I am not alarmed if I don't.

5 THE COURT: You are using the word "new
6 bone." I am saying some kind of healing process.

7 THE WITNESS: The only thing you can recog-
8 nize taking place is on an x-ray.

9 THE COURT: You can't see it with the naked
10 eye, that is for sure.

11 THE WITNESS: New bone is the only thing you
12 can see. I wouldn't be alarmed if it wasn't there.

13 THE COURT: Isn't it customary to take x-rays
14 to see what the condition of the bone is?

15 THE WITNESS: Yes.

16 THE COURT: That's all I am asking, nothing
17 else.

18 Q Now, do you know if there were x-rays taken
19 in September of 1972?

20 MR. KELNER: Your Honor, I don't-- This is all
21 improper redirect examination. It's not that I want
22 to object--

23 THE COURT: Let's take a recess right now.
24 We will take a few minutes' recess. You
25

Neviaser-redirect/Rudofsky

can't get through in five minutes.

MR. RUDOFSKY: I have only three more questions written down.

THE COURT: All right.

Q To the best of your knowledge, are there different forms of osteomyelitis?

A Yes, sir.

Q Would you tell us what kinds of forms there are?

A We alluded to some, hematogenous, which is by blood, infection going around the blood, which seeds the bone with infection or bacteria.

You can get osteomyelitis from an open fracture.

You can get others, which really don't have much to do with this case, which are rather rare and difficult to treat.

Tuberculosis. Other types of bony infection, which are not important here.

Q Mr. Kelner read you a series of statements from the Merck manual. What form or forms of osteomyelitis do these statements refer to?

A Hematogenous and from what I understand the hematogenous as well as osteomyelitis coming from an open

fracture, at least in the beginning he was stating that.

The other statements, I didn't know which ones he was talking about.

Q Now, on cross-examination Mr. Kelner indicated in reading, I believe from the Physicians' Desk Reference, and correct me if I am incorrect -- he indicated it is important during using this Keflex that you have to be on the lookout for superinfection; to the best of your recollection, did Mr. Lennon ever develop a superinfection?

MR. KELNER: That is objected to, if your Honor pleases. That would have to be keyed in--

THE COURT: I will allow the answer. I have pretty much in mind what the case is about. He can answer.

A No, sir.

MR. RUFOFSKY: This is one of the few times a lawyer says he has three questions and actually stops after three.

RECROSS EXAMINATION

BY MR. KELNER:

Q Are you still with the St. Albans Naval Hospital or any military or naval hospital?

A No.

THE COURT: He is in private practice.

Neviasser-recross/Kelner

Q You have no further association with the Government agencies or hospitals?

A No. My commission has been resigned. I resigned my commission.

MR. KELNER: One more question.

Q Doctor, did you or anybody ever tell Mr. Lennon at any time he was in the hospital that acts of malpractice or improper practice are being committed upon him to alert him to the fact that he would have a lawsuit--

MR. RUDOFISKY: I object.

THE COURT: I think it goes to the one jurisdiction problem.

MR. RUDOFISKY: I think Mr. Kelner is suggesting--

MR. KELNER: Without beating around the bush, I would like to--

THE COURT: Personally, I think the question and answer is self-evident.

MR. KELNER: May I get it on the record?

THE COURT: The Doctor is not going to state to a patient, "Watch out, Son, I may be doing something that you can sue me for malpractice on."

MR. KELNER: That is part of the defense. That is their defense, and I thought I ought to put it on the record.

1 Neviaser-recorss/Kelner

2 I withdraw the question.

3 MR. RUDOFISKY: Can he look at this x-ray
4 and we will be finished with him.

5 THE COURT: All right.

6 REDIRECT EXAMINATION

7 BY MR. RUDOFISKY:

8 Q This is Plaintiff's Exhibit 8 in evidence,
9 which previously has been identified. These are x-rays
10 taken of Mr. Lennon on September 18, 1972.

11 Doctor Nevaizer, will you describe for us
12 the medical significant portion of this x-ray with respect
13 to infection process and with respect to healing of the
14 fracture? Just those two things.

15 A I see very little new bone formation, very
16 little healing at that time.

17 In reading the x-ray, if I did not know the
18 patient I would say there is evidence of some area, where
19 he is pointing here (indicating), that may represent infec-
20 tion, but I couldn't be sure.

21 MR. RUDOFISKY: Your Honor, this goes to the
22 point whether there was healing process or not for
23 your edification.

24 THE COURT: I understand.

25 MR. RUDOFISKY: I have no further questions.

Neviaser-recross/Kelner

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2 Q Based on everything you know in the record
3 and your knowledge of the patient's case and all the testi-
4 mony you've given, and looking at this exhibit, would you
5 say this was a source of infection in September, 1972, when
6 this x-ray was taken?

7 A I stated that previously.

8 Q That it was?

9 A Yes.

10 MR. KELNER: No further questions.

11 THE COURT: All right, thank you, Doctor.

12 We will take a recess.

13 (A recess was taken at this time.

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16 (Continued on the next page.)
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2 MR. RUDOFISKY: Your Honor, as a preliminary
3 matter, counsel and I have agreed to stipulate as
4 follows for the record, this is with respect to the
5 alleged refracture, July 17 or thereabouts, 1973,
6 at the Castle Point Veterans Administration Hospital.

7
8 As you may recall, prior testimony with
9 respect to the x-ray reports indicated that the
10 radiologist or the doctor who had signed these
11 reports was a Dr. Debbas. In lieu of calling Dr.
12 Debbas as a witness for the Government, we're going
13 to stipulate that was the doctor to be called as a
14 witness, she would testify that her name is Maureen
15 S. Debbas; that she's a medical doctor; that she
16 attended Trinity College in Washington, D.C., where
17 she received a Bachelor of Arts degree in 1962; that
18 she had a woman's internship residency and fellowship
19 at St. Vincent's Hospital in New York City from
20 1966 to 1971; that in the intervening period she
21 attended medical school and graduated therefrom,
22 although my record is not clear with respect to what
23 medical school; that after -- that on December 10,
24 1971 she became Board certified in Radiology by the
25 American Board of Radiologists; that thereafter she
worked at Vassar Brothers Hospital in Poughkeepsie,

2 1
2 New York from November, 1971 until July, 1973 as the
3 assistant and the the associate radiologist; that
4 thereafter she became associated with the Veterans
5 Administration Hospital of Castle Point, New York as
6 a consultant in May and June of 1973 --

7 MR. KELNER: Can I interrupt to save time?

8 MR. RUDOFSKY: Yes.

9 MR. KELNER: May I include in the stipulation
10 that we do not contend or concede; she's a qualified
11 radiologist.

12 MR. RUDOFSKY: I have just two more lines.

13 She was the Acting Chief of Radiology d uring
14 July and August of 1973 and she became the Chief
15 of Radiology in September of 1973 and has been
16 continuously thereafter the Chief of Radiology at
17 that hospital and were Dr. Debass to be called to
18 testify she would further testify that she has no
19 personal recollection of the incidents described in
20 the medical records, but that she did examine x-rays
21 as indicated in the x-ray reports and she did sign
22 the reports and to the best of her knowledge the
23 reports accurately reflect whatever it is that she
24 saw on those dates.

25 MR. KELNER: We will so concede that she would

3
1
2 so testify without conceding the accuracy or the
3 truth of her testimony, Your Honor.

4 THE COURT: Right.

5 MR. KELNER: But, there is one further thing
6 I would like counsel to concede; we demanded
7 production of those x-rays relating to the fracture
8 at Castle Point Hospital and that for some unexplained
9 reason they have disappeared and are not available
10 for the Court's examination, even though we did
11 demand their production.

12 MR. RUDOFISKY: We certainly concede that,
13 Your Honor. For the record, I'll state that I have
14 been advised by Dr. Debass and by District Counsel
15 for the Veterans Administration who investigated
16 the tort claim in this case that the Castle Point
17 x-rays none of which have been produced in court,
18 for reasons that I am in the midst of explaining,
19 that those x-rays, when Mr. Lennon was transferred
20 to the Brooklyn V.A. Hospital, that those x-rays
21 were sent at that time in the ambulance to the
22 Brooklyn V.A. Hospital and that's the last record
23 anyone has of them.

24 I've discussed that with counsel before. I
25 don't mean to infer by that that Mr. Lennon had

1
2 anything to do with the disappearance or loss of the
3 x-rays, but that's the last time they were seen by
4 anybody.

5 MR. KELNER: Okay.

6 THE COURT: There're in some cabinet some
7 place. Nobody knows where.

8 MR. RUDOFISKY: I call Dr. Allan Smith.

9 A L L A N G. S M I T H, called as a witness, having
10 first been duly sworn by the Clerk of the Court,
11 was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. RUDOFISKY:

14 MR. RUDOFISKY: Your Honor, I've represented
15 to counsel that Dr. Smith is the Chief of Orthopedics
16 at the Brooklyn V.A. Hospital and he's indicated to
17 me that he'll concede Dr. Smith's expertise.

18 THE COURT: His qualifications.

19 MR. KELNER: Just to save time, Your Honor.

20 BY MR. RUDOFISKY:

21 Q Just one specific question, Dr. Smith: as
22 part of your practice over the years with the V.A. or
23 otherwise, have you had experience with amputees?

24 A Yes.

25 Q And could you tell us just so the Court can

1
2 understand, can you approximate how many amputees you have
3 treated?

4 A Well, I would say hundreds, more particularly
5 as the -- as an orthopedic consultant to the V.A.
6 Prosthetic Center in Manhattan.

7 MR. RUDOFSKY: In the interest of time, let
8 me try to get to the heart of the matter.

9 THE COURT: Sure.

10 BY MR. RUDOFSKY:

11 Q Dr. Smith, did you participate in the
12 operation in which Mr. Lennon's leg was amputated?

13 A Yes. The record indicates I was present at
14 the time, yes.

15 Q Do you recall, were you the lead surgeon or
16 assistant surgeon or in what capacity were you present?

17 A I'm sorry, I can't recall exactly the capacity.
18 I can only refer to the record that I was present at that
19 time.

20 Q And thereafter did you attend to Mr. Lennon
21 at the Brooklyn V.A. Hospital?

22 A Yes.

23 Q And were you the attending physician when he
24 was discharged?

25 A The last --

Smith-direct/Rudofsky

Q After the amputation, the last discharge?

A Yes.

Q Were you the attending physician?

A Yes.

Q And could you describe for us the condition of his stump at that time, medically, from a medical point of view, what was the condition of the stump?

A To the best of my recollection his stump was -- the wound was healed, there was some area of irritation around the distal end of the stump. Again, that's the condition.

Q Can you tell us what the prognosis was?

A It was my feeling that Mr. Lennon's stump was ultimately -- the wound would ultimately go on to heal and the amputation would improve to be fully healed.

Q And at that time was there any reason -- was there any contrary indication, was there any problem with his stump that you were aware of?

MR. KELNER: Will you fix the date on that, please?

THE COURT: The date of discharge.

Q The final date of discharge.

A I'm sorry, I lost track of the question.

Q At the time of this discharge, you've told us

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2 what your prognosis was. Was there any contrary indications
3 that he would not -- any reason to believe at all whether
4 or not you believed -- was there any reason why anyone
5 would have any reason to believe he wouldn't have a good
6 recovery?

7 A There are some notes on the chart that would
8 indicate we were not entirely satisfied to discharge Mr.
9 Lennon at that time, but that because of problems in the
10 hospital, both he and we agreed it would be best for him
11 to go.

12 Sensitively speaking, I don't want to give you the
13 impression that the amputation was completely healed. On
14 the other hand, we had no reason to believe it would not
15 subsequently go on to heal.

16 MR. RUDOFISKY: Your Honor, at this time,
17 counsel has previously indicated he would have no
18 objection to Dr. Smith just briefly examining Mr.
19 Lennon's stump, the present condition of it as Dr.
20 Coven did. So could we do that at this time?

21 MR. FELNER: I have no objection.

22 (Whereupon the Plaintiff comes forward and
23 an examination ensues.)

24 MR. KELNER: Your Honor, may I agree on a
25 description for the record at this time?

THE COURT: At this time the doctor has been palpating the surrounding areas of the stump, approximately to the apparent scarring tissue, and indicating the sensitivity in reference to the Defendant -- to the Plaintiff --

MR. KELNER: May I just add a few words, if counsel doesn't disagree? May we have an agreement that there is an area on the lateral or outside area of the leg between the knee and the stump, there is an area that is visibly red; also that there is an area where there is -- I don't know if you call it a fissure --

THE COURT: It's more than a fissure.

MR. KELNER: A vaginal scar, I think it's called. It has areas of redness and tenderness about it.

THE WITNESS: You would use the word invaginated instead of vaginal.

THE COURT: Would you describe what you did, so we have the medical rather than the judge and the lawyer?

THE WITNESS: If he's through.

MR. KELNER: Just one more thing: on palpation or some pressure by the doctor, the patient winced

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and drew back with some evidence or manifestation of
painful reaction.

I don't want to embellish it.

THE COURT: I use the word sensitivity to be
touched.

Now, doctor, you be the expert.

BY MR. RUDOFSKY:

Q Doctor, let's get to the point: what is the
condition of the leg today?

A All right. Mr. Lennon has a BK amputation,
below knee amputation of standard length; the wound at this
point seems still to be healed; there is no evidence of
any drainage; there is some invagination over the scar at
the distal end of the tibia and some irridema or redness.

THE COURT: You can come up Doctor.

THE WITNESS: (continuing) There's some
irritation at the distal end of the tibia in the region
over the scar; the scar does seem to move freely over the
end of the tibia.

MR. KELNER: May the record indicate that on
palpation the patient is wincing with pain. And, at
the proper time, I would like to present our contentions
to the Court that this has a direct relationship to
his weight bearing, as he stands and walks.

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2 MR. RUDOFSKY: Without associating myself with
3 the collateral remarks, it's clearly painful to
4 Mr. Lennon.

5 THE WITNESS: But the other point is this
6 scar is moving, it's not stuck. There is some
7 irridema, redness over the head of the patient's
8 fibula as described by Mr. Kelner, the patient has
9 a good range of motion and can bend his knee; there
10 does not seem to be any tenderness in the area
11 below his knees.. The patella tendon -- or over the
12 "condiles" of his femur.

13 At this time, there seem still to be no
14 swelling in the amputation stump.

15 MR. KELNER: Your Honor, may I ask the witness
16 a few questions -- the Plaintiff?

17 THE COURT: Sure.

18 MR. KELNER: Bob, when you tell us, based upon
19 your pangs experienced, is it in a stage preliminary
20 to opening up as it has done on many occasions, as
21 you earlier told the Court, when you were on the
22 witness stand; is that correct?

23 THE PLAINTIFF: Yes.

24 MR. KELNER: Where does it open up when it
25 does frequently open up?

1
2 THE PLAINTIFF: You can see it right there,
3 it's starting. It's starting to open.

4 MR. KELNER: (to the witness) Please don't
5 keep touching any more, because I think you made the
6 point. I'd like to spare him the wincing from pain.

7 THE WITNESS: I'm sorry, in order for me to
8 properly examine the stump -- and you're giving the
9 medical --

10 THE COURT: He has a right to look at it.

11 MR. KELNER: I don't mind him looking at it
12 but --

13 THE COURT: I think I know why he wants
14 still to touch it.

15 THE WITNESS: Because you're going to ask me
16 questions about it in the future.

17 MR. KELNER: I don't know if I'll ask any
18 questions.

19 This point, where you say is the site where
20 it keeps opening up and draining, would you point to
21 that and would you point to what area he is talking
22 about, for the record?

23 THE PLAINTIFF: Here and here.

24 MR. KELNER: What area is that? Is that the
25 part of the scar that you earlier mentioned as an

1
2 invagination; is that what it was?

3 THE WITNESS: Well, I'm sorry, Mr. Kelner,
4 you're asking the leading questions that I really
5 can't answer. The patient is stating some time in
6 the future he might have some opening over an area.
7 I think that's something none of us can be sure of,
8 that it's going to happen. At this time, at this
9 stage, I see no opening or any drainage. You're
10 asking me to describe what I see.

11 MR. RUDOFISKY: The question though is: what
12 area is he pointing to? How would you describe that?

13 THE WITNESS: The patient is pointing over
14 into the area of the scar over the distal end of
15 his tibia.

16 MR. KELNER: That's all I wanted.

17 THE COURT: It's not draining right now.

18 THE PLAINTIFF: No.

19 THE COURT: There is no issue.

20 Anything else?

21 MR. RUDOFISKY: Yes.

22 BY MR. RUDOFISKY:

23 Q Doctor could you describe -- excuse me,
24 withdraw that.

25 Could you compare the condition of Mr. Lennon's

1
2 stump today with the condition of the stump when he was
3 discharged from -- by you, from the V.A.'s hospital?

4 A I would say, if anything, the condition of
5 his stump has improved since the time he left the hospital.

6 THE COURT: Would you say that's maximum
7 improvement to the stump or still more improvement
8 is required?

9 MR. KELNER: I'm sorry, I didn't hear you.

10 THE COURT: Is that maximum improvement with
11 reasonable medical certainty?

12 THE WITNESS: With reasonable medical certainty.
13 I would like to see the area of the distal end of
14 the tibia show less redness, and we would like to
15 see the healing in that area would be similar to all
16 of it.

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18 (Continued on next page.)
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2 Q And did your examination reveal anything of
3 medical significance with respect to weight bearing by Mr.
4 Lennon?

5 A My examination would indicate that the areas
6 where weight bearing comes ordinarily in a below knee
7 amputee show no areas of irritation, there's no soreness,
8 that's why I made the point over the patella tendon, there
9 seems to be no areas -- no difficulty at this time, which
10 is a prominent -- which is probably the most important
11 areas as far as weight bearing is concerned.

12 Q Is the area of the scar a weight bearing
13 area?

14 A It is not.

15 Q Has it been your experience in dealing with
16 these amputation cases that you referred to before, has it
17 generally been your experience that amputees with
18 comparable stumps are able to have -- strike to have
19 are able to ultimately use a prosthesis and bear weight
20 on it?

21 A It would be my opinion from what I see of
22 examining Mr. Lennon's amputation today that with reasonable
23 certainty I would feel that he should be able to wear the
24 type of prosthesis which he is wearing, which is a below-
25 kee prosthesis, with the usual facility that most amputees

1 of this type would have.

2 Q I want you to assume that Mr. Lennon has a
3 cyclical condition of this scar opening and of there being
4 some drainage for a period of a week or perhaps a little
5 more than a week, and then closing for a period, which we've
6 heard described sometimes as a month or sometimes up to
7 two months, in that range, and then an opening again where
8 he cannot wear the prosthesis, and then it closes up and
9 he can wear the prosthesis for another period. I want you
10 to assume that and I would like you to tell us both on the
11 basis of your experience as an orthopedic surgeon and
12 on the basis of your examination of Mr. Lennon this
13 afternoon what Mr. Lennon must do in the future so he can
14 be able to use the prosthesis to break this cycle and to
15 be able to use this prosthesis successfully.
16

17 MR. KELNER: That is objected to. It seems
18 there is a definite course that will accomplish that
19 result.

20 THE COURT: This is the question of a medical
21 expert as to whether, in his opinion, that occasion
22 would ever take place. Can you tell us?

23 THE WITNESS: Well, again, based on what I
24 see today, which is a one episode --

25 BY MR. RUDOFSKY:

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2 Q I want you to assume he has this condition
3 that he's testified to that he has this cyclical condition
4 and it opens after he wears the prosthesis for a while,
5 he bears weight, it opens, he has to take it off and then
6 it closes up after a while and he could wear his prosthesis
7 for a while, this is his condition and he's testified to
8 it, so, assuming that were so, where do we go from here,
9 in your opinion?

10 A As indicated, when Mr. Lennon bears less
11 weight on the prosthesis, the wound tends to heal. At the
12 time of maximum healing, assuming this is the case, at the
13 time when maximum healing has occurred, it might be
14 necessary to revise the incision in that area at some
15 future date.

16 It would be my feeling, based on being a young
17 amputee with good circulation, that this revision would
18 heal and would ultimately relieve the problem.

19 Q If you could briefly tell us what's involved
20 in a revision?

21 A Well, in this case, it would be a matter of
22 excising the scar that seems to be invaginated and
23 approximating the edges, so that they're not -- approximating
24 the edges in a smoother fashion.

25 Q Would a large amount of the stump have to be

1 removed, in your opinion?

2
3 A Based on what I see today, no.

4 THE COURT: Would you rule it out, based on
5 what you see today and the reaction of the patient
6 himself, would you rule it out, eventually?

7 THE WITNESS: I would rule it out.

8 THE COURT: All right.

9 BY MR. RUDOFSKY:

10 Q All right, I want you to assume --

11 THE COURT: That's only with a reasonable
12 degree of medical certainty?

13 THE WITNESS: Well, Your Honor, the only
14 question would be, again, if an x-ray showed that
15 there were some underlying infection that I can't
16 see from the surface, then it might be possible that
17 you would have to remove some more, but since I don't
18 have an x-ray that shows that there's any underlying
19 infection there, I'm assuming all we're seeing is
20 soft tissue.

21 THE COURT: The surfact --

22 THE WITNESS: The surface, and therefore,
23 removing that surface.

24 THE COURT: That's the reason for your opinion?

25 THE WITNESS: Which would reasonably remove the

1
2 problem.

3 BY MR. RUDOFSKY:

4 Q I want you to further assume then, this goes
5 directly to what you've been saying, that there's been
6 testimony in this case that Mr. Lennon's bone, the remaining
7 bone is not involved, and at least up to date, with any
8 infection process, but he has a condition known as
9 cellulitis. Are you familiar with cellulitis?

10 A Yes.

11 Q Will you tell us what it means to you?

12 A Cellulitis means irritation of the cell.
13 That's what it means, it is.

14 Q I want you to assume, as testified to by
15 Dr. Coven, that this cellulitis stems from what we're
16 referring to as an underlying bacterial involvement. Is
17 there such a thing? Can cellulitis come from bacteria?

18 A Yes.

19 Q Now, I want you to assume that, in addition
20 to what you see today, I want you to assume he has cellulitis
21 in this area, around the scar, and it comes from a bacterial
22 source, but he does not have osteomyelitis in the bone.

23 A Okay.

24 Q Does that change your prognosis, that you've
25 just given us, as far as what would be required in the

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future?

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A No.

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Q Now, is the revision that you have described is that -- is that serious surgery, major surgery as the term is used?

7

THE COURT: All surgery is serious.

8

9

A I think there's some discrepancy between doctors feel and patients feel.

10

11

12

Q We're trying to get to the heart of this, in light of the hour, I think you know what we're driving at.

13

A I don't think it's life threatening.

14

Q Is it any more life threatening --

15

A No.

16

17

Q (continuing) than the run-of-the-mill surgery?

18

19

A Sir if there is such a thing as run-of-the-mill surgery.

20

Q I'm trying to cut to the heart of it.

21

22

THE COURT: I don't know if any such thing, even a cut in the hand is a terrible thing.

23

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Q It has the usual attending surgical risks, the patient might throw a clot or something of that nature?

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A Yes, sir, but there are no usual surgical

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risks

MR. KELNER: Counsel is leading.

THE COURT: We're trying to get to it.

MR. KELNER: I would object.

MR. RUDOFSKY: I'm leading in light of the hour.

A I'll indicate that this is not something that we would consider a major procedure.

Q Now, I want you to assume that Dr. Coven has testified that a somewhat more extensive revision would be necessary, not just the removal of the scar, as you have testified, but that I think -- what did he say, an inch --

MR. KELNER: If Your Honor please, Dr. Coven specifically said he would not be in the position of advising the surgery because of the hazards he spelled out on the witness stand. I think you're misquoting, not intentionally --

THE COURT: His position was whether or not there would be additional surgery beneath the knee, but kind of questionable whether or not it would be above the knee, it would have to be made at the time, to consider which of the two would be favorable, if I recall.

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2 MR. KELNER: But then, stating, and the record
3 will establish --

4 THE COURT: You would have to look at it to
5 determine you're examining, just where it would be?

6 THE WITNESS: This is my position: when you
7 asked me about the thing, but I would say it's not
8 my opinion from what I see today.

9 THE COURT: Your opinion is you could take
10 care of the invaginated scar locally?

11 THE WITNESS: Locally, right.

12 THE COURT: Whereas his opinion is he might
13 have to take off some more?

14 THE WITNESS: I'm seeing from what I feel
15 today today that's not likely.

16 THE COURT: Is that what you want? A little
17 bit more?

18 MR. KELNER: You have Dr. Coven's testimony?

19 MR. RUDOFSKY: Yes.

20 MR. KELNER: If Your Honor please there's been
21 a misunderstanding here. May this question be read,
22 so that we have it exactly?

23 THE COURT: Yes.

24 MR. KELNER: May I read it or will you read
25 it?

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2 MR. RUDOFSKY: I want to find what I am looking
3 for.

4 THE COURT: Ask him to assume.

5 MR. KELNER: May I read it for the record?

6 MR. RUDOFSKY: Your Honor, Mr. Kelner is going
7 to have an opportunity to cross examine and I'll
8 give him the transcript. He can ask him about
9 anything else he thinks is relevant.

10 THE COURT: All right.

11 BY MR. RUDOFSKY:

12 Q I want you to assume that Dr. Coven was asked --
13 and for the record, I'm referring to page 281 on his direct
14 examination, that he was asked the following questions and
15 he gave the following answers:

16 "Question: Can you, at this time --" you
17 being Dr. Coven -- "give any specific prognosis
18 as to what, in the future he --" the he being Mr.
19 Lennon -- "may undergo in the way of surgery, medical
20 care and protracted expenses? Answer: Yes, I can.
21 Question: What can you do? Answer: I think
22 in light of the history and in light of the almost
23 five-year interval and in light of the reoccurring
24 episodes on this very day, he may not accept or
25 decide -- or may decide, knowing the risks, not to

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2 accept the revision, I believe with what I find and
3 his history, that eventually it will not be an
4 attractive situation and that it will be mandatory.
5 So I think he will have one revision, if I can
6 project one revision, an operation. I cannot predict
7 whether he will have to have a second above the knee
8 amputation."

9 I want you to assume that. Assume that Dr. Coven
10 predicts he'll need one revision. I believe the record
11 will indicate approximately an inch or an inch and a half --

12 THE COURT: Below the knee.

13 Q (continuing) he could not predict whether
14 he would need an above the knee revision. Can you tell us,
15 in the same way you indicated with respect to the revision
16 that you were discussing, would a revision, a further
17 revision of this stump of approximately an inch or an inch
18 and a half, would that be a life threatening operation?

19 A No.

20 Q Would that have any unusual surgical risks,
21 and the judge and counsel are aware we're all aware of what
22 we mean by the usual surgical risks?

23 A No.

24 Q No, it wouldn't?

25 A No.

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MR. RUDOFSKY: I have no further questions.

MR. KLLNER: May I have the transcript,
please?

MR. RUDOFSKY: Yes.

(Continued on next page.)

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Q Doctor, I read this question and answer to you of Dr. Koven's testimony:

"Question: Doctor, so that you can understand me, if this young man asked you flatly, unqualifiedly do you recommend it or did you recommend it --"

I'm sorry, you'll have to -- recommend it?

Q Meaning further surgery, a revision operation. And so we're talking about all kinds of revisions, operations --

THE COURT: He's talking about revisions by possibly cutting one inch or so further.

THE WITNESS: All right.

(No response to Kelner.)

Q Well, may I read a previous answer? I think it will be us in the context, his answer to a previous question:

"Answer: As I have stated before, there is a 50-50 chance here and in these situations it is my policy not to be forceful, if I can use that word. The patient has to be a participant, knowing all the possible outcomes, the ultimate decision, since here we are not dealing with a cancer, let us say -- has to be a joint one and not one that I would enforce upon him, if I understand your question."

Next question:

1
2 "Doctor, so that you can understand me, if this
3 young man asked you flatly, unqualifiedly, do you
4 recommend it or did you recommend it or are you going
5 to recommend it as a possibility, without being in
6 the position of recommending it, what would be your
7 answer?

8 "Answer: My answer would be the latter, that I
9 would not specifically recommend it.

10 "Question: Why?"

11 Shall I wait, your Honor.

12 THE COURT: No, it's all right.

13 BY MR. KELNER:

14 Q "Answer: My answer would be the latter, that
15 I would not specifically recommend it.

16 "Question: Why?

17 "Answer: I think that the hazards are perhaps
18 too strong. I personally would rather have a limb
19 below the knee amputation and take a gamble that I
20 would have some measure of control of my lifestyle,
21 but I must say that what we're dealing with, for a
22 full answer here is a dynamic situation, that is if
23 the infection gets worse, and it may very well be
24 then there may come a point where I might be much
25 more forceful in telling him. So it is an ongoing

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2 situation with an answer almost at each stage rather
3 at one point in time. I think it is a hazard both
4 ways. Certainly there are hazard both ways."

5 Now, Doctor, it's very difficult for me to ask
6 you do you agree with everything he said, but in
7 substance would you agree that there are hazards and
8 gambles in performing this particular operation, if
9 it were ever to be presented to him for a decision?

10 MR. RUDOFISKY: Which operation?

11 A Well, sir, first of all, you'd have to qualify
12 the operation. Why don't you ask me if you want me to
13 revise the distal end of the stump, I'm not sure which
14 operation you're asking about.

15 Q Let me approach it this way: I'm trying to be
16 very brief --

17 THE COURT: You're asking revising the distal
18 end of the stump, one or above the knee is the other
19 and the scar is the third. There are three alterna-
20 tives.

21 Q Sir, I'm going to ask you to assume that
22 Dr. Koven, in substance, has stated that any surgery or
23 revision here, in the presence of cellulitis, which he has
24 diagnosed as being present now would present certain hazards
25 and dangers. Would you agree with that, to that extent?

1
2 A No, sir. You have to ask me a specific
3 question. I can't generalize about surgery when you're
4 asking me about "its" and "thems", you have to be specific.

5 Q I'll try to be specific and very brief.

6 Do you know whether or not this young man now
7 has cellulitis, you not now having seen him for several years?

8 A I indicated he had some erythema over his
9 stump which would indicate he had cellulitis.

10 Q And cellulitis in effect is an irritation or
11 aggravation of the stump -- the normal structure of the cells
12 of the soft tissues; is that right, sir?

13 A Yes, sir.

14 Q Does that present a hazard or a complication
15 or a risk in relation to performance of further surgery
16 through those tissues?

17 A As indicated, as Mr. Lennon indicated to us
18 when he doesn't put weight on the leg, the cellulitis tends
19 to quiet down, it gets much better. So nobody is advocating
20 that we do a big operation with a lack of cellulitis. What
21 we're doing is revising, once the cellulitis gets less,
22 which Mr. Lennon indicates happens when he doesn't wear his
23 prothesis. Then we would suggest, perhaps, a revision of
24 the stump would prevent further recurrences, which would
25 happen when he does wear it.

1
2 Q Now, would you say it would improve him or
3 might improve him?

4 A It would be, with reasonable medical certainty,
5 I would say it would improve him.

6 Q In other words, if he were your patient, you
7 would recommend it if he can get a subsistence of the
8 cellulitis condition, if that's what you're saying?

9 A I'm saying that if Mr. Lennon has a significant
10 difficulty, that's an assumption. I don't know. I haven't
11 seen Mr. Lennon in some time, but assuming he has a signifi-
12 cant difficulty, that with medical treatment this difficulty
13 could most probably be remedied through the revision of his
14 stump.

15 Q You can't guarantee it though as a doctor, can
16 you?

17 A Well, sir, I guess we can't guarantee anything
18 in this world.

19 Q As a matter of fact you have had numerous
20 amputees, who year after year, as much as ten years, have had
21 repeated revisions and repeated artificial -- protheses and
22 never could accommodate, never could adjust to the normal
23 weight bearing, as much as one can bear weight; haven't you
24 seen cases like that, sir?

25 A You're asking me two separate cases. First,

you're asking my experience and giving me yours. So I can't answer your question.

Q I'm asking you, haven't you personally had patients who never could accommodate to the prothesis?

A No, sir.

Q You never had that?

A No, sir.

Q Have you heard about those who have had?

A I don't know if that applies to this.

Q I didn't ask about this, sir. I'm asking, have you encountered --

A I'll answer the question, no.

Q You never heard of this happening with anybody at all?

A No.

Q Are you saying to this Court every single amputee sooner or later can be fitted with a prothesis and have revisions on the stump and ultimately get a successful result in every single case? Is that what you're telling this Court?

A It's been my experience.

Q Not your experience, I'm asking about experience of others in addition to yourself.

A I'm sorry. I can't testify to other people's

experience. I'm testifying to my experience.

Q By the way, he was your patient, was he not?

A Yes, sir.

Q And you did not accomplish this ultimately, totally successful result from the amputation which you yourself performed; isn't that so?

A No, sir, it's not. Mr. Lennon left our service on his own volition and sought other medical --

Q Of his own volition or yours?

A His.

Q Isn't it a fact you said he was on narcotics from the painkilling drugs, Demerol, and you wanted him out of the hospital?

A No, sir.

Q That is not true?

A It's not true.

MR. RUDOFISKY: Your Honor, --

THE COURT: Yes, don't raise your voice.

At this time of day, you may wake some of us up.

MR. RUDOFISKY: I really would ask the last question and answer be stricken from the record as outside the scope of any examination that's taken place of this witness or in this case, and secondly it's totally irrelevant to the case.

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2 THE COURT: Well, I wouldn't say totally
3 irrelevant. It is relevant if he had to seek other
4 medical --

5 MR. RUDOFISKY: There's been no issue in this
6 case. We heard Mr. Kelner himself on the first day
7 of trial, when I had Dr. Smith sitting with me --

8 THE COURT: That wasn't the purpose of the
9 question.

10 MR. KELNER: Not at all.

11 THE COURT: The purpose of the question was:
12 are you saying he left of his own volition -- and I
13 assume the inference the Court is supposed to draw or
14 at least he'd like the Court to draw, if he had
15 stayed with Dr. Smith he wouldn't have had to be here
16 today to worry about the additional tenderness.

17 MR. RUDOFISKY: I wouldn't --

18 MR. KELNER: Don't interrupt the Court.

19 THE COURT: That's how I understand it. I
20 don't know if I'm accurate or not.

21 MR. RUDOFISKY: I'm not referring to that --

22 MR. KELNER: If your Honor please, I'm content
23 to drop the issue.

24 I would request, at the proper time, to have
25 Mr. Lennon testify as to the circumstances of his

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leaving the hospital, for whatever relevancy it may
hav in the case.

THE COURT: I don't know.

MR. RUDOFISKY: I don't see that's an issue in
the case.

THE COURT: I think we have enough problems
without me trying to find out who said what.

MR. KELNER: I have no further questions.

THE COURT: All right, thank you, Doctor.

(Witness excused.)

(Whereupon, the Court then recessed until
March 17, 1977 at 4:30 p.m.)

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<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>PEDIRECT</u>	<u>RECROSS</u>
THOMAS JAY NEVIASER	407	446	537	544
ALLAN G. SMITH	551	571		

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROBERT A. LENNON, :

Plaintiff, :

-against- :

UNITED STATES OF AMERICA, :

Defendant. :

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76-C-396

United States Courthouse
Brooklyn, New York

March 17, 1977
5:00 o'clock p.m.

B e f o r e :

HONORABLE MARK A. COSTANTINO, U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

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Appearances:

JOSEPH KELNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUPOFSKY, ESQ.
Assistant U.S. Attorney

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2 THE COURT: All right, gentlemen, call your
3 witness.

4 M A R V I N L. S H E L T O N, called as a witness
5 on behalf of the Government, having been
6 duly sworn by the Clerk of the Court,
7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. RUDOFSKY:

10 Q Dr. Shelton, are you a medical doctor?

11 A Yes, I am.

12 Q Would you tell us what state you are licensed
13 to practice medicine in?

14 A New York.

15 MR. KELNER: Could we save time by conceding
16 his qualifications?

17 THE COURT: Yes, I think so.

18 MR. RUDOFSKY: Let me just --

19 THE COURT: How long have you been a doctor,
20 sir?

21 THE WITNESS: 20 years.

22 BY MR. RUDOFSKY:

23 Q What is your present position?

24 A I am Attending Orthopedic Surgeon at the
25 Columbia Presbyterian Medical Center and Chief of Orthopedic

1
2 Surgery at the Harlem Hospital Center, New York City.

3 MR. KELNER: Is it all right if I stay here,
4 Your Honor?

5 THE COURT: Sure, sure.

6 BY MR. RUDOFSKY:

7 Q Dr. Shelton, if you would, I would like you
8 to step off the witness stand for a moment and examine
9 Government's Exhibit A, which has been previously identified
10 as an x-ray taken on May 15th -- excuse me, on May 18, 1973.

11 Have you ever seen that x-ray before?

12 (The witness then took a position before the
13 x-ray.)

14 A Yes, I have.

15 Q Did I bring that to your office and did you
16 have an opportunity to review it at that time?

17 A I did.

18 Q And do you recognize it as the same x-ray as
19 I brought to your office?

20 A Yes.

21 Q Okay.

22 Would you tell us as briefly as you can what you see,
23 starting with the and concentrating on the x-ray of the
24 left portion, the left portion of the x-ray, what does it
25 portray and what medical significance do you see?

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2 A This is a lateral or side view of the tibia
3 (indicating), of the leg, and it shows that the tibia was
4 broken as well as the fibula. The Fibula was broken in
5 the middle third and the tibia was broken in the upper
6 third.

7 The tibial fracture is held completely on the
8 posterior aspect with evidence of new bone formation or
9 callous, and there is a mild posterior angulation at the
10 level of the fracture (indicating).

11 There is some irregularities of the anterior cortex
12 suggesting that the fracture was a comminuted, that is more
13 than one piece, fracture.

14 Q Is there anything else of medical significance
15 that you see there?

16 A Well, on the other view, which is the AP
17 view, there is a radial lucence or defect in the cortex
18 of the bone, suggesting that an intra "medulary" nail had
19 been used in the "management" of the fractures at some
20 point.

21 Q Do you see anything on those x-rays with
22 respect to infection either before or at the time the x-rays
23 were taken, or at the time the x-rays were taken?

24 A I see no clear -- I see no clear evidence of
25 infection.

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2 The usual signs of infection are destruction of bone
3 which would be manifest by dark spots in the bone, the
4 presence of what we call periostial thickening, particularly
5 in layers, the presence of fracture which is not healed,
6 and the presence of obviously dead bone, that is bone that
7 has no circulation.

8 These are the classic signs of infection in the bone
9 and I am unable to identify any of those classic signs on
10 these x-rays.

11 Q Okay.

12 And specifically, would your answer be the same if
13 I used the term osteomyelitis instead of the general term
14 infection, would your explanation and your answer be the
15 same?

16 A Yes, I see no definite evidence of osteo-
17 myelitis on these x-rays.

18 Q Okay.

19 Now, have you ever had occasion to use or have you
20 heard used by other orthopedic surgeons the term or phrase,
21 "good result"?

22 A Yes.

23 Q Okay.

24 Would you say what good result or a good result means
25 to you?

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2 A Well, for a fracture of the tibia it would
3 mean a tibia which had healed, that is the bone is reunited
4 and the position of the fragments of the bone, that is
5 the fractured site is good in regard to overall alignment
6 and there has not been excessive shortening of the limb.

7 Among other things those are the major objects or
8 treatment of a fracture, that is getting the bone to heal
9 in good position.

10 Q Do you have an opinion as to whether the
11 x-ray that you are looking at now, Government's Exhibit
12 A, whether that shows a good result?

13 A In regards to bony healing, I would rate it
14 a good result, in other words, the bone is healed and the
15 position is certainly satisfactory.

16 Q I want you to assume that there has been
17 evidence in this trial that approximately -- well, strike
18 that, let me rephrase it.

19 I want you to assume that there has been testimony
20 and evidence at this trial that in July of 1972, some 10
21 months before this x-ray was taken, that this patient
22 cultured on one occasion specifically, July 6, 1972,
23 aerobactus species, staphlococus aureus coagulace negative,
24 and harillia vaginicola, and that thereafter this same
25 patient on July 13, 1972, again cultured aerobactus species,

1
2 and that on July 20, 1972 this patient cultured pseudomonas
3 aruginosa, and again aerobactus species, and that on
4 September 18, 1972 the patient cultured staphlococcus
5 aureus coagulace positive, betastreptococcus not Group A,
6 not Gropu D, and again pseudomonas aruginosa;

7 Then, on November 9th there was another culture,
8 staphlococcus aureus coagulace positive;

9 That on Ncvember 16th there was another culture,
10 staphlococcus aureus coagulace positive;

11 And that on December 13, 1972 there was another
12 culture of staphlococcus aureus coagulace positive.

13 Now, Doctor, assuming that that has been established
14 prior to your appearance here today, do you have an opinion
15 based on this x-ray as to whether or not these organisms
16 that I have mentioned to you were able to and indeed did
17 infect the bone that is represented in this x-ray?

18 MR. KELNER: That is objected to, Your Honor,
19 there is utterly no foundation whatsoever for this
20 question to be posed.

21 THE COURT: There is no foundation, yes.

22 MR. RUDOFISKY: Your Honor, it seems to me that
23 the witness has testified that there was no sign of
24 infection.

25 We have heard a lot of testimony about all

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2 of these various culture results and what a grave
3 situation they created.

4 I think that the witness ought to be allowed
5 to tell us what he knows.

6 THE COURT: You are going to ask him which of
7 those caused the osteomyelitis condition?

8 MR. RUDOFSKY: No, I'm asking him if there is
9 any evidence at that time, at the time of this x-ray,
10 at the time the x-ray was taken, that at that time
11 the bone was infected by those organisms, any of
12 them, or by anything else.

13 THE COURT: His testimony is he doesn't see
14 any at this point. That is what he said, so I can't
15 see how he can answer your question on a speculative
16 situation such as that. There is no foundation, that
17 is what it amounts to.

18 DIRECT EXAMINATION

19 BY MR. RUDOFSKY: (continuing)

20 Q Well let me ask you this, then:

21 Will you assume that there has been testimony at
22 this trial that as of December 13, 1972 this bone was
23 infected and that the infection, and again I'm quoting from
24 page 262 of the record, "that the infection had become so
25 sensitive, deep-seated, virulent and thoroughly engaging

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2 the bone that the bone was not responsive to good treatment
3 and that it failed to heal."

4 Do you agree or disagree with that statement?

5 MR. KELNER: That is objected to, there is
6 no foundation to show that this witness has gone
7 through all the hospital records and that he knows
8 this patient and that he has examined everything in
9 detail sufficient to give him a basis for answering
10 such a hypothetical question.

11 Your Honor, I submit this is utterly unwarranted,
12 without foundation whatsoever, merely looking at an
13 isolated x-ray and being supplied with a record of
14 four cultures taken over a period of months, and to
15 ask a question like that I submit, sir, is completely
16 unwarranted, it is without proper foundation, and
17 I must object to it.

18 MR. RUDOFSKY: Well, my response is two responses
19 to that:

20 Number one, if the witness cannot answer the
21 question, that is if this x-ray is insufficient,
22 then of course, he is subject to cross examination
23 as to his credibility, and he can merely say that the
24 x-ray doesn't tell him enough.

25 But the other answer is that I was under the

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2 impression that we were going to try and get to the
3 heart of the matter in view of the lateness of the
4 hour.

5 I might say for the Court's edification that
6 the Doctor has had an opportunity to examine the
7 records, if that makes any difference.

8 THE COURT: You can ask him whether his answer
9 will be based on the entire record, has he had an
10 opportunity to examine the records.

11 BY MR. RUDOFSKY:

12 Q Doctor, have you had an opportunity to
13 examine the records with respect to Robert Lennon at the
14 St. Albans Hospital during the period June 9th to December
15 29, 1972?

16 A Yes, I did.

17 Q And during the course of your examination,
18 did you see the culture and the sensitivity tests that
19 I refer to?

20 A Yes.

21 Q Now, on the basis of your examination of the
22 record and on the basis of what you see before you, do you
23 have an opinion as to whether on the date of this x-ray
24 Mr. Lennon had a deep-seated, virulent, thoroughly engaging
25 infection?

THE COURT: What exhibit is that?

MR. RUDOFSKY: That is Government's Exhibit

A.

MR. KELNER: What is the date, May --

MR. RUDOFSKY: May 18, 1973.

MR. KELNER: I won't object to the question,
Your Honor.

THE COURT: I will let him answer it.

BY MR. RUDOFSKY:

Q Do you have an opinion?

A No.

THE COURT: "No."

Q You don't have an opinion at all or you didn't
have --

A I have no opinion.

THE COURT: He has no opinion.

Q Do you have an opinion as to whether this
x-ray shows a healed bone?

A Yes, it is healed in my opinion.

Q Did your review of the record, the medical
record, indicate to you that during the Fall of 1972 there
had been certain antibiotics prescribed for Mr. Lennon?

A Yes.

Q And do you recall or do you want to take a

1
2 look at the record and tell us what antibiotic was
3 prescribed for him?

4 MR. KELNER: I think it has all been gone
5 over.

6 We will concede whatever has been gone over
7 repeatedly, there is no dispute about what is there,
8 what is there is there.

9 MR. RUDOFSKY: Okay.

10 Q Then you are aware, then, that Mr. Lennon was
11 given Keflin and Keflex?

12 A Yes.

13 Q And are you also aware that on December 13,
14 1972, Mr. Lennon underwent a surgical procedure?

15 A Yes, I am.

16 Q Now, are you aware that on September --

17 MR. KELNER: If Your Honor please, to save
18 time, we will concede that everything that has
19 already been the subject of testimony repeatedly
20 is in that record, and we will assume that the
21 Doctor having said that he read them, then we will
22 assume these questions are not necessary, we will
23 concede that.

24 BY MR. RUDOFSKY:

25 Q Do you have an opinion, then, as to whether

1
2 or not the infection of Mr. Lannon's leg and bone in the
3 Fall of 1972 was treated properly?

4 MR. KELNER: That is objected to, Your Honor,
5 I think he should be more specific.

6 THE COURT: Ask him if after having reviewed
7 the hospital records --

8 MR. RUDOFSKY: Every time I start to do that
9 Mr. Kelner says he concedes all of that.

10 THE COURT: You have to lay a foundation,
11 just a general foundation.

12 MR. KELNER: If Your Honor pleases, I will
13 withdraw my objection.

14 May we have the answer?

15 BY MR. RUDOFSKY:

16 Q Do you have an opinion, knowing what you
17 know about the hospital records and the treatment afforded
18 to this plaintiff as to whether or not he received proper
19 treatment and good accepted practice for this community?

20 A Is there a period that you want?

21 Q From the beginning of September the 18th on
22 when the Staphlococcus positive was cultured.

23 MR. KELNER: May I understand that question?

24 You are not going back all the way to June 9th
25 and July 5th and all of those events, you are only

1 asking questions concerning September?

2 MR. RUDOFSKY: At the moment.

3 MR. KELNER: September, 1972 and thereafter?

4 MR. RUDOFSKY: For the Court's edification,
5 I am attempting to break it into two periods, that
6 is all.
7

8 MR. KELNER: That is all right.

9 THE COURT: Two periods.

10 MR. RUDOFSKY: From September through December.

11 Q Do you have an opinion as to that period?

12 A In my opinion the treatment was within
13 accepted standards during that period.

14 Q And do you have an opinion based on your
15 review of the hospital records and based on your review of
16 the x-rays as to whether the treatment was effective?

17 A Yes, I would rate it as effective.

18 Q Okay.

19 Now, do you have an opinion with respect to the
20 treatment received by Mr. Lennon from July 5th through
21 September 18, do you have an opinion as to whether that
22 treatment, based on everything you have read in the hospital
23 records, whether that treatment was in all respects
24 inconformity with the accepted standards of medical care
25 in the community?

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2 A Well, I would not be able to say in all
3 respects, I think in a large number of respects the treatment
4 was within standards accepted in the community.

5 Q And in what respect would you say there was
6 a deviation from the standards accepted in the medical
7 community?

8 A Well, the number of cultures taken I think
9 was too few, the initial of the antibiotic was probably not
10 the best in view of its potency, in terms of potency, and
11 in the manner of dressing changes that had something to be
12 desired during the period.

13 Q Okay.

14 Now, based on your review of the hospital records,
15 based on your understanding of the treatment that was
16 rendered in the subsequent period, September to December,
17 1972, based on your review of this x-ray, do you have an
18 opinion as to whether Mr. Lennon's physical condition was
19 adversely affected by these deviations from the accepted
20 standards of care that you have set down for us?

21 A Well this is a difficult question to ask
22 because the problem we are dealing with is an infected
23 fracture, and I'm not really able to say what course of
24 treatment would have cured this initial problem of the
25 infected fracture.

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2 I think that there would be no way that I could give
3 an opinion as to what would have cured this man's
4 possessive fracture.

5 Q Now, in which period are you talking, are
6 you referring now --

7 A At any point, once the bone becomes infected
8 the prognosis is extremely grave as far as any cure
9 and there really is no guaranteed way to cure an infected
10 bone. There are a number of things that are tried, a number
11 of preferences, but overall prognosis is extremely poor as
12 regards complete recovery.

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14 (Continued on next page.)
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Q In connection with your response, I would like to ask you again on the basis of everything you know about the record, whether the -- specifically, the aerobacter species that was cultured once or twice in July of 1972, whether any failure to properly treat the presence of that organism adversely in the long run -- whether it adversely affected Mr. Lennon.

MR. KELNER: If your Honor please, I suggest in his own question, saying "I would like to ask you again," I'm saying he's asking it again.

MR. RUDOFISKY: I don't think I said "again." If I did, I'll take it out.

MR. KELNER: If your Honor wants to hear it again--

THE COURT: Yes.

MR. KELNER: All right.

A It does not appear to me the aerobacter culture during the summer played any significant role in the final outcome of this man's fracture.

Q The same question with respect to staphylococcus aureus coagulase negative.

A Yes, the later course of this patient's condition showed that those two organisms were no longer involved in this process or his problems.

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Q Herillia vaginacola?

A Those organisms were not cultured after September.

Q That leaves, with respect to the summer period, pseudomonas. Can you give us your answer with respect to pseudomonas, as to whether that played any role?

A I felt the pseudomonas wasn't cultured until September.

Q There's a culture of pseudomonas in July, and it was cultured, again, in September.

A (No response)

Q I think we can get to the heart of it. The point is that that did continue on and that did require treatment; is that correct?

A That's correct.

Q Just one last question. I want you to assume that pseudomonas was a continuing problem from July 20th onward in the sense that it's in the July 20th culture and it shows up, again, in the September culture.

I also want you to assume there's been testimony at the trial that during this period -- specifically from July 28th onward -- that Mr. Lennon did not have an elevation of fever; that he did not have a high white blood cell count;

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That he did not have sweats at night;

That he did not have extreme tenderness,
pain at the area of the culture;

On the basis of those assumptions, can you
tell us whether pseudomonas posed a significant problem
during this period, this period being from July 28th
through September?

A Well, pseudomonas infections are serious
problems.

In general, we fear pseudomonas infections.

Whether that has anything to do with the
final result is really not clear, because the pseudomonas
subsequently disappeared from this wound and apparently was
not present toward the end of the clinical course of this
fracture.

MR. RUDOFISKY: I have no further questions.

MR. KELNER: I'm going to try to limit myself
to ten minutes.

THE COURT: I hope so.

MR. KELNER: Counsel took almost a half hour.
I'm not quarreling with that.

CROSS EXAMINATION

BY MR. KELNER:

Q Wherever you can answer yes or no, will you

try to do so.

A Yes.

Q Without compromising your position. All right?

A Yes.

Q Doctor, you said pseudomonas requires treatment, and it is a serious bacteria or strain of infection; is that right?

A Yes.

Q What medication was being administered to handle the pseudomonas? If you know, tell us; if not, tell us.

A None.

Q None.

Was that a serious matter, sir, to have no medication, antibiotic, or anything to handle that medication in the case of an infection fracture, infected fracture area?

A I would consider an error of judgment.

Q Error of judgment. Is that all, Doctor, or would you say it's a failure to conform to proper practice in the case of a young man with a known infected fractured area?

A Well, the question would only be properly

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2 answered if one were sure where the pseudomonas was
3 originating. If you're culturing soft tissue, superficial
4 wound, and you get a pseudomonas, you're not nearly as
5 concerned about that as you would be if it were coming from
6 a deep cavity.

7 Q Was there a deep cavity in this boy's leg,
8 let's say, in July of 1972, so that you can see the bone?
9 Do you know whether that's so or not?

10 A It's difficult to picture exactly what the
11 condition of his leg was; however--

12 Q Excuse me, Doctor. I'm interrupting you
13 because I'm trying to save time.

14 Do you happen to know now whether the
15 hospital record shows that in July of 1972, one could
16 actually see the bone through an opening in the leg? Do
17 you happen to know that?

18 A I do not know that that is in the hospital
19 record.

20 MR. KELNER: Will counsel concede that is so?

21 MR. RUDOFISKY: We'll concede on July 13th the
22 bone could be seen; however--

23 THE COURT: No.

24 MR. RUDOFISKY: I would like to put it in
25 context. That's not the date of the culture, but

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I will concede that on that date there's a note to that effect, yes.

Q Are you aware that dead bone was found in this boy's leg and was drilled into, in some manner, on July 23th, 1972? Do you happen to know that?

A I know that the cortex of the bone was judged dead and removed by burrowing type of action, which is a little different than drilling into.

Q Drilling into it, assuming that there was drilling into it, that would be improper, isn't that so?

A If you mean if you were to take a drill and make an opening from the outside of the bone into the medullary canal--

Q That would be improper, wouldn't it?

A A simple drill hole in general would not be good.

Q Assuming that the record states that there was drilling through bleeding bone -- I'm quoting exactly, verbatim -- assuming that was done, Doctor, would that be improper?

A I've read this operative report. I happen to know the surgeon that operated on him, and I know what he did was remove the outer layer of the cortex, but did not drill into or through the cortex of the bone into the

medullary canal.

Q In other words, Doctor, you spoke to him about that?

A I know-- You see, I happened to teach this young surgeon how to operate and I know what he's trying to say that he did.

I agree the language is a little confusing.

Q Did you teach him?

A Yes.

In my opinion, what the technique he was using was removal, scraping off, of the dead surface which had been exposed to the air, down a millimeter or so until you get to live bone and then have your granulation tissue go across it and skinraft it.

Q Doctor, did you call him or did he call you to discuss that matter of that operation record where it said, "Drilled through bleeding bone"?

Did he call you or did you call him, or did someone arrange a meeting?

A No, I've had no contact with this man.

Q Perhaps I misunderstood you. Did you say you spoke to him?

A I talked to him and I've read the record.

Q You talked to him or you didn't talk to him --

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2 which i t?

3 A I'm sorry; you're getting me confused.

4 Q I'm trying to get through fast. If I'm too
5 fast, please stop me and I'll have to bring you back another
6 time. I don't want to keep the Judge late.

7 A I taught. You thought I said I "talked."
8 I taught him.

9 Q In other words, between us, is it fair to say
10 that you never have taught any orthopedic surgeon student
11 to drill through bleeding bone? Is that correct?

12 A Yes, the technique--

13 Q Don't tell us the technique. Answer this yes
14 or no.

15 You have never taught that?

16 THE COURT: We want to know whether or not
17 you taught that--

18 THE WITNESS: I'm trying to de-emphasize the
19 significance of the wording, the operative report,
20 because for a number of reasons this oftentimes is not
21 exactly what the surgeon is doing. He has trouble,
22 sometimes, in dictating and translation and I think
23 it would be erroneous for you to establish or have
24 me establish the fact that the bone was drilled
25 through from the outside to the inside, which is

improper.

Q Sir, I don't want you to have to say anything that is not true and honest and accurate.

In the parlance, in the language of doctors, students, teachers, when one is drilling to bone or through bone, do those words have the same connotations, the same definitions as laymen would understand the words to mean, or does the medical profession--especially you when teaching, and your students when learning -- do they have a different understanding, a different definition for the words "to" and "through" or drilling to or through bone, or is it a layman's general understanding of what those words mean?

A Sir, I hate to belabor the point, but I'm a surgeon. Dr. NeViasel is a surgeon. He's writing the report. I understand the report to mean a certain thing. It's not what you're saying.

He did not drill through the bone in an improper manner, but merely Rongeuired or burnished the surface until he got to bleeding bone, which is proper.

Q Let's leave the subject. I don't have the time to explore it as I would like to. It might be interesting, Doctor, what caused this bone to be dead, to have dead bone, say, an inch and a half in dimension on

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2 July 28th. Can you tell us why it was dead by then?

3 A It had no blood supply because of the initial
4 trauma which in addition to breaking the bone strips the
5 blood vessels which are attached to the bone, nourish it,
6 away,

7 Q Are you aware there was pus found weeks earlier,
8 July 5th and July 6th?

9 A Yes, sir.

10 Q Would that be an indication, an alarming
11 finding, to put one on notice that there is infection of
12 this area of the leg?

13 A There is infection. The question in the
14 mind of the doctors who are treating him--

15 Q I didn't ask you that.

16 MR. KELNER: I move to strike it out.

17 Q Won't you please answer my question, Doctor.

18 A Yes.

19 Q I want to be polite, I really do.

20 A All right.

21 Q Let's go on to something else.

22 You said in answer to counsel's question
23 there were too few cultures taken; is that what you said?

24 A Yes.

25 Q Because there's a necessity to take frequent

1
2 cultures to keep on top of the problem of infection; isn't
3 that a fair statement?

4 A Yes.

5 Q Because if you're giving one particular medi-
6 cation for a certain known strain, it is known that those
7 strains can change, and you need a change in the medication
8 to handle the problem; isn't that so?

9 A Yes.

10 Q And when you say there were too few cultures,
11 you were referring to the period between July 5th and
12 September 18th; isn't that so?

13 A Yes.

14 Q And that was a crucial time in the handling and
15 management of this known infected area; isn't that a fair
16 statement?

17 A Yes, all periods are crucial.

18 Q But just answer my question.

19 A Yes.

20 Q That was a crucial period, was it not?

21 A Yes.

22 Q So when you say too few cultures, is it because
23 there was a necessity to keep watching for changes in the
24 strains of bacteria to keep changing if necessary the kind
25 of medication or antibiotics that would be administered;

1
2 is that a fair statement?

3 A Yes, sir.

4 Q That was not done, was it?

5 A No.

6 Q Also, you said they were not of the right
7 potency, if I caught your language correctly, correct?

8 A Yes.

9 Q Because you need something that is potent
10 enough, strong enough, to manage the particular bacterial
11 strains that are found in the cultures; isn't that so?

12 A Yes.

13 Q That wasn't done here either, was it, Doctor?

14 A Not-- I think not to the desirable degree.

15 Q Doctor, you also said that it left something
16 to be desired, I'm trying to quote you exactly -- on a
17 third matter, if I recall, concerning the changes of dressings;
18 is that right?

19 A Yes.

20 Q Did you notice, Doctor, that in five separate
21 places this young man, this patient, who is untrained, un-
22 skilled -- the patient himself -- was instructed to and
23 permitted by hospital personnel, to change his own dressings;
24 the first one noted in the record only four days after an
25 operation of July 28th? Did you happen to see those entries?

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A Yes.

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Q Is that what you're referring to, Doctor, when you said that left something to be desired?

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A Yes.

6

Q Contrary to your teachings?

7

A Yes.

8

9

Q Contrary to any teachings you gave to Dr. Neviaser; isn't that a fair statement?

10

A Yes.

11

12

Q That was spread out over a period of time starting on August 2nd, only four days after that July 28th operation, and continuing over a period of time into the fall and all the way to December; isn't that true?

13

14

15

A Yes.

16

17

18

19

20

Q Doctor, I'm going to ask you: Is it your teaching and is it proper and required proper medical practice and procedure for a doctor to read nurses' notes when he makes the round concerning a patient, particularly one with osteomyelitis and an infected fracture area?

21

A Yes, he should read the nurses' notes.

22

23

Q Those nurses' notes are not there for the edification and interest of the nurses; isn't that so?

24

A Yes.

25

Q They're there so a doctor who can't physically

1
2 be there twenty-four hours a day, can at least come around,
3 look at the nurses' notes to see how the patient is faring;
4 isn't that a fair statement, sir?

5 A Yes.

6 Q So, if the doctor said that -- if a doctor
7 said to this Court, assuming, that he did not need to
8 read the nurses' notes, it was not necessary to read the
9 nurses' notes, if that in substance was his testimony,
10 would you say that is wrong medically speaking, sir?

11 A Yes.

12 Q Then I think you also said --

13 MR. KELNER: I'm nearly through, your Honor.

14 Q I think you also said you can't say what
15 would have cured this particular condition of osteomyelitis,
16 you said that with all frankness, did you not?

17 A Yes.

18 Q There's no question regardless of what we
19 see here in this x-ray of May 1973, and I haven't got the
20 time to quarrel with you about little things, you may or
21 may not feel about it, there's no question that the infection,
22 the osteomyelitis and the ultimate amputation, all were a
23 result of the infectious process that did set in which
24 resulted in osteomyelitis; is that a fair statement, sir?

25 A Yes.

Shelton-cross

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1
2 MR. KELLNER: I have no further questions.

3 THE COURT: Thank you, Doctor.

4 MR. RUDOLFSKY: What's our schedule for
5 tomorrow, Judge?

6 THE COURT: Off the record.

7 (Discussion off the record.)

8 THE COURT: This case is adjourned until
9 Thursday morning at ten o'clock. Check with me
10 on Tuesday.

11 (Time noted: 5:50 p.m.)
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1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK
3

4 -----X
5 ROBERT A. LENNON, :

6 Plaintiff, :

75-C-396

7 -against- :

8 UNITED STATES OF AMERICA, :

9 Defendant. :

10 -----X

11 United States Courthouse
12 Brooklyn, New York

13 April 4, 1977

14
15 B e f o r e :

16 HONORABLE MARK A. COSTANTINO, U.S.D.J.
17
18
19
20
21

22 HENRY SHAPIRO
23 OFFICIAL COURT REPORTER
24
25

Appearances:

JOSEPH KELNER, ESQ.
JAMES H. DEUTSCH, ESQ.
Attorneys for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFISKY, ESQ.
Assistant U.S. Attorney

2 L E O K O V E N , called as a witness, having been
3 previously sworn by the Clerk of the Court, resumes the
4 stand and testified as follows:

5 CROSS-EXAMINATION

6 BY MR. RUDOFISKY: (Continued.)

7 Q Doctor Koven, when we last were proceeding
8 in this case, I had asked you to refer to a notice in the
9 Veteran's Administration records exhibit 5 for July 31, 1973,
10 which is at page 303 of the medical record. I believe that
11 note was written by Dr. Chung. I will ask you to refer to
the notice for that date which is in fact signed with the
13 first initial A, and the last name which is not terribly
14 decipherable. I believe it's DiRaimondo, but I don't
15 think that is necessarily relevant for our purposes. Do
16 you see the last -- note?

17 A The last note at the bottom of the page.

18 Q Would you read that note into the record?

19 A "Orthopedic consultation done today. Possible
20 small separation of fragment noted by the consultant after
21 careful review of X ray. Long leg cast applied, toes in
22 good condition, A, Aquino.

23 Q What's the significance if any of the fact that
24 the toes were in good condition?

25 A I assume if I can read into his mind that he

Koven-cross-Rudofsky

meant that the circulation was normal, or within a normal range.

Q In fact I believe it was your prior testimony on direct that thereafter your review of the record has indicated no deviation from the accepted practice in the community with respect to the VA -- from this point onwards, the problem that you found was in the delay in noting this possible fracture, from July 17th to July 21st.

A What year, sir?

Q 1973.

A Yes.

Q Now, I would like to direct your attention to the period June 29th to July 28th, 1972, the treatment by Dr. Neviasser during that period in St. Albans Naval Hospital. On July 5th and 6th -- I believe, on July 6, 1972, Dr. Neviasser took a culture, did he not?

A Would you direct me to the number of the page? It will save time. Yes, it was taken on July 6th.

Q I believe thereafter he took another culture -- strike that.

What was the result of that culture?

A This was reported on July 11, 1972 as containing an organism aerobacter, as well as another organism known as staphylococcus aureus and another one known as Herellea vaginicola. And these were then reported as

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to sensitivity to antibiotics as well on the same date I believe.

Q Now, there has been some testimony at the trial since your last appearance here that -- by Dr. Neviaser, that he considered these skin contaminants. Do you agree or disagree with that proposition?

A I would disagree. I don't think there is enough evidence to state whether or not they were skin contaminants, however, my understanding was that they were from a specimen of pus taken which was beneath the skin, and therefore I don't know that they would be skin contaminants.

Q Are any of them, or all of them, found on the skin, the normal healthy skin of a person?

A Aerobacter is usually not, staphylococcus aureus is usually not, herellea maybe.

Q In any event, in any of the subsequent cultures taken were those organisms ever found again in Mr. Lennon's case?

A Well, yes, the next culture which I have -- which I see recorded here was taken on July 13th and again the aerobacter was reported.

Q How about the other two, the Herellea and staphylococcus?

A The staphylococcus was not reported on July 13.

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The only thing reported was on the aerobacter.

Q After July 13th was aerobacter reported in Mr. Lennon's case?

A Yes.

Q When was that?

A On July 25th along with a new organism called Pseudomonas, aruginosa. And the aerobacter is again reported.

Q After that time, was aerobacter ever reported?

A Unless I am mistaken that was the only culture sensitive taken in this record.

Q That is Exhibit 1, 23 have 2, 3, 4 and 5.

A Thereafter referred to -- for 3 months.

Q You testified to the sensitivity or lack of sensitivity that were done in the cultures, and lack of cultures. I am now asking you if aerobacter was every again reported in Mr. Lennon's case, after July 25, 1972?

A Plaintiff's Exhibit 1 carries us down to the discharge from the hospital on September 25th. The next culture is reported on -- at the time of the next admission. The admission was on the 18th of September and the culture appears to have been --

Q At the present time , we will get to offer one of those cultures. I would appreciate it if you would tell us if aerobacter was present. We know that there were

5 1 other things present.

3 A There is no culture --

4 Q In the next cultures that you are looking
5 through.

6 A There was no culture taken on that admission.
7 From 18 September, '72 to 24th of September. On Exhibit 3
8 plaintiff, which is the admission of 11/15/72 and extending
9 to 12/29/72, the first culture was 11/16, reported on
10 11/20/72 and at that time there was staphylococcus aureus.

11 Q We understand what was found. The point I am
12 trying to make and I am asking you is whether aerobacter
13 was found again. That's all. We all understand what was
14 found. I am trying to bring out what was not found.

15 A I don't want to mix these records up. This is
16 the record of the St. Albans Naval Hospital and it's January
17 of '73. There is no organism of that nature found. That's
18 in Plaintiff's exhibit 4 and Plaintiff's Exhibit 5 --

19 Q If I may stop you for a moment. I think there
20 are some other -- In Plaintiff's Exhibit 4 there are some
21 additional tests from St. Albans. Would you also tell us
22 with respect to those whether -- those are from November and
23 September --

24 A I have already stated that there is no aero-
25 bacter found. As I recall, unless you want me to look through

in detail in the next admission there were none --

MR. RUDOFISKY: We can agree that there was no aerobacter.

MR. KELLNER: If the doctor says that, I will agree to it.

Q Now, herellea was also never found again, correct?

A No.

Q And staphylococcus aureus coagulase negative which was that third organism found in July of '72, that was never found again; is that correct?

A That is correct.

Q You told us in one of those July 19'th '72 cultures pseudomonas was present?

A Yes.

Q Can you tell us how many more times pseudomonas was cultured in Mr. Lennon's case after that date?

A After that date. As I stated previously no cultures were taken in September and October of '72 admission at all. The next was in November to December admission in '72 and cultures of November 16th -- I am sorry -- yes, November 16th, November -- December 13th, fail to show evidence of pseudomonas. In the St. Albans record --

Q Now you are looking at Exhibit 4.

A Pseudomonas is found.

HS#1fw

1
2 Q What date is that?

3 A September 18, '72-- September 18, 1972.

4 I'm wondering off the record are we mixing up records here.

5 MR. RUDOFSKY: Off the record.

6 THE COURT: Yes.

7 THE WITNESS: At any rate, pseudomonas was
8 found.

9 Q In September?

10 A But not in Plaintiff's Exhibit 2, but rather
11 in Plaintiff's Exhibit 4.

12 Q And thereafter.

13 A I am turning to Plaintiff's Exhibit 5, which
14 is the-- There are some new organisms present here--

15 Q I want to know if pseudomonas was carried
16 forward.

17 A Yes.

18 (Pause)

19 A I can't seem to find any cultures.
20 Can you direct me to any that you notice?
21 I cannot find any.

22 In the batch of records, I am referring now
23 to microbiology reports taken in May, June and July,
24 from 1973. I find no evidence of any pseudomonas.

25 Q Now, You have previously expressed your

1
2 opinion at this trial as to the propriety of Dr. Neviaser's
3 treatment in July of 1972. With respect to that testimony,
4 would you tell us where on Mr. Lennon's leg you believe
5 Dr. Neviaser first found pus, if you could locate it for
6 us physically.

7 A Under his sig-- referring now to the narrative
8 summary which appears to be signed by Dr. Neviaser, it
9 states that the area where the pus was, as I understand
10 his note, was beneath the portion of the leg where the
11 sutures had been removed.

12 The sutures had been applied at the time an
13 open reduction had been performed.

14 If you want to get more specific, I will
15 keep looking.

16 Q Is it your understanding that this was at
17 the fracture site or above the fracture site or below the
18 fracture site, or if you do not have any understanding as
19 to that, you can so testify.

20 A I don't have a firm understanding from the
21 records, it was in the area of the fracture site. Whether
22 immediately above or below I am not sure from the records.

23 Q Do you know from the records how many inches
24 above the fracture site the incision extended up towards
25 the groin--

A 654

1 A Could you repeat that?

2 Q How many inches above the fracture site did
3 the incision extend? Going up the leg, in other words.
4

5 A The surgical incision that was made at the
6 time of the open reduction, is that what you're referring
7 to, sir?

8 Q Yes.

9 A Dr. Deviaser does not appear to have indi-
10 cated in his report how many inches that incision was.

11 Q How about the operative report?

12 A That's what I'm referring to.

13 Q That is Dr. Dermaton's report.

14 A You asked me about the operation site. It
15 was performed by Dr. Dermaton.

16 Q I want you to assume that there has been
17 testimony in this trial in your absence that the incision
18 extended at least two to three inches above the fracture
19 site and that the pus -- this pocket of pus that we have
20 discussed here was found on July 5th or July 6, that that
21 pus was found at the upper end of that incision; does
22 that change your opinion in any way, make it a less serious
23 condition?

24 A No. Pus can track up or down or be directly
25 over. In other words, it is medically known as pointing,

1 that is, pointing refers to the area where it is first
2 noted by visualisation or palpation from the surface.
3

4 However, it may extend through a tract far
5 deeper and far more distant than the actual site where you
6 first see the pus.

7 Q Now, I would like to direct your attention
8 to the operative procedure of July 28.

9 A Yes.

10 Q Do you have any opinion based upon the record
11 as to where on Mr. Lennon's leg that procedure took place?

12 A Yes.

13 Q What is your opinion?

14 A That it-- That the procedure states that it
15 was in the right tibial wound--

16 Q Would you place it for us.

17 A Is the surgical wound that was made at the
18 time of the operation of 6/12, I believe.

19 Q Could you place it for us with respect to
20 the fracture site again?

21 A I am not sure that I could on the basis of
22 this report. It's not specific.

23 Q Do you have an opinion based on the record
24 as to whether the fracture site was involved in the oper-
25 ation at all? This July 28 operation, whether it was

1
2 exposed or otherwise involved?

3 A Only by inference. There is no specific men-
4 tion of the fracture site in the July 28 record other
5 than it is in the same general area.

6 Q So what is your inference, that it was or
7 was not involved?

8 A That is was involved.

9 Q Was this one of the bases for your opinion
10 that you have previously expressed that irrigation and
11 suction should have begun in conjunction with the operation?
12 I know you have testified that the operation should have
13 been done earlier in your opinion.

14 Is this one of the bases for your opinion?

15 A The basis for that opinion has nothing to do
16 with the fracture per se. It has to do with the fact that
17 it is clearly indicated that -- it is clearly indicated
18 in the operative report of July 28, that the areas of pus
19 involved the underlying bone, hwihc is a condition
20 known as osteomyelitis and in my opinion the appropriate
21 treatment with or without a fracture is the use of such
22 procedure after properly removing all the areas of infected
23 dead bone.

24 Q Is that your opinion even in a case where the
25 fracture site is apparently not involved and the use of

1
2 suction and irrigation would require opening the incision
3 and exposing the fracture site?

4 A Absolutely.

5 Q Now, this area of osteomyelitis that you
6 believe existed at this time, this time being July 29 or
7 thereabouts, 1972, was this at the fracture site or below
8 the fracture site?

9 A On the basis of Dr. Neviasser's report, it
10 is too incomplete to state -- to permit me to give you an
11 answer.

12 Q Subsequently, did Mr. Lennon's osteomyelitis
13 and the destruction of bone which led to the amputation,
14 was that found at the fracture site or was that found
15 above the fracture site?

16 A Can you help me by giving me the exact
17 date that you're referring to?

18 Q Well, the amputation was--

19 A I have it.

20 It appears to have been in both areas.

21 Q What do you mean by both areas?

22 A In other words, both above and at the fracture
23 site and probably below as well, if the involvement was
24 widespread throughout the bone and not localized above,
25 at, or below.

1
2 Q Based on the record, can you tell us how
3 far above the fracture site the osteomyelitis was ever
4 found -- the furthest point?

5 A O.K. Well, on one set of X-rays it says
6 the chronic osteomyelitis the distal tibia.

7 The x-rays I have indicate that it was also
8 in the proximal tibia, so it wouldn't be bypassing it, it
9 would be a continual involving of the entire shaft of
10 the bone.

11 I don't have an x-ray of the lower half,
12 because when I saw the patient the lower two-thirds had
13 been amputated. That area of the bone did contain osteo-
14 myelitis, Plaintiff's Exhibit 5.

15 The x-rays that I have of the upper third
16 did indicate that he did have osteomyelitis of the upper
17 third.

18 Putting these two facts together, the entire
19 bone was involved.

20 Q The x-rays that you have just referred to,
21 the x-rays you have, when were those taken?

22 A I testified previously that the ones I have
23 here were taken on January 6, 1977.

24 Q Doctor, you have testified that in your judg-
25 ment it was improper procedure for Dr. Nevaizer to drill

1
2 into bone on July 28, 1972; is that correct?

3 A I stated-- My understanding of what I
4 stated was that it was improper to drill through dead
5 bone into healthy bone.

6 Q When you said "drill," as best as you can
7 put it into words, what did you mean?

8 A Creating a hole in the bone with an elec-
9 trically powered instrument, which has a drill bit at
10 its end and penetrates the bone through its turning power.

11 Q I want you to assume that Dr. Neviasser
12 testified that although he used an instrument which he
13 referred to as a Halle drill, instead of using, has you
14 described it, a drill bit, that he used a burr at the
15 end of it and as indicated in his July 21 doctor's note,
16 that he burred off the dead bone until some of the bone
17 underneath bled.

18 Is that more in accordance with proper
19 procedures in your opinion?

20 MR. KELNER: I object on the grounds that
21 counsel is now abandoning in effect what the
22 hospital record has stated, that he drilled through
23 bleeding bone and that is an exact quotation from
24 the record. If counsel is going to give a number
25 of hypothetical propositions to the doctor, I suggest

1
2 he is getting away from the actual record in this
3 case, signed and made--

4 THE COURT: There has been testimony
5 by an expert as to what was meant.

6 MR. KELNER: I would like to point out in
7 Plaintiff's Exhibit 1, at the note for July 28,
8 page 29 Government Exhibit, Dr. Neviasser used the
9 word "burring." Said "burring of bone."

10 THE COURT: All right.

11 MR. KELNER: I think it is substantiated by
12 the record.

13 I realize counsel has drawn into issue what
14 the report says. But I don't think we are going
15 beyond what the hospital record says in this sense.

16 THE COURT: Proceed.

17 Q My question to you, Doctor, is whether the
18 burring of dead bone to expose the live bleeding bone, while
19 not -- perhaps not a full saucerization that would
20 be required -- that the burring would be more in accord-
21 ance with proper standards of proper care and treatment
22 than the drilling that you hypothesized.

23 MR. KELNER: He didn't hypothesize. I read
24 the actual record.

25 THE COURT: It's in there.

1
2 A It's the same thing. Whether drilling or
3 burring, you're turning an instrument that leaves a hole
4 through the bone. The drill leaves a screw type hole.
5 You are going from dead, infected bone into living bone,
6 and you are you're implanting your instrument, the
7 bacteria and the pus into the healthy bone by doing this,
8 by doing any kind of drilling or burring maneuver.

9 It would have the same consequence.

10 Q Will you accept the proposition that the
11 presence of bleeding bone indicated that there was live
12 bone under the dead layer or level? Can we agree on that
13 much?

14 A There was bleeding bone noted at the time
15 of the operation after the completion of the use of the
16 Halle drill.

17 Q Was there live bone left after this pro-
18 cedure?

19 A Yes.

20 Q And is that what the skin was grafted to,
21 the live bone?

22 A Yes, in part.

23 Q In part. What else was it grafted to?
24 If it burred away the dead bone and you don't agree with
25 that, if that's what he did, to burr away the dead bone to

1
2 live bleeding bone, what else did he graft it to?

3 A The soft tissues around it.

4 Q I concede that he also grafted to the soft
5 tissues. Focusing on the bone, he grafted it to live
6 bone, didn't he?

7 A As I read this record, yes.

8 Q So you want to change your testimony at
9 page 241 of the record that he took dead skin and it was
10 placed over dead bone?

11 A No. If I may explain? I am only taking
12 this on your hypothetical, but I believe from my interpre-
13 tation that there was significant dead bone in this wound
14 at the time of the graft.

15 The fact that there was some bleeding bone,
16 does not indicate that there was not dead bone as well.

17 Q Your interpretation is based upon the in-
18 terpretation that he used a drill?

19 A And I would say the same thing if he used
20 a burr.

21 Q If he testified that he burred off the dead
22 bone, leaving bleeding bone, that he did not testify
23 that he left dead bone behind, if you would assume that,
24 then can we also assume that he grafted to live bone?

25 A If we assume that to that extent, yes,

1
2 I can make that assumption.

3 Q You previously testified that based upon
4 your understanding of dead skin to dead bone, that the
5 graft did not take; isn't that correct?

6 A I stated that it is my understanding that
7 the graft did not take.

8 Q And on direct Mr. Kelner asked you to review
9 the progress notes--

10 A Did not take fully--

11 Q On direct Mr. Kelner asked you to review
12 and to testify with respect to the progress notes from
13 July 28 to August 1st. Would you take a look at that
14 the first progress note.

15 A Yes.

16 Q What does that say?

17 A Saline dressing started, pus over bone
18 noted today or -- either today or Q day, meaning every day.

19 Q Would you read the following three notes?

20 A "8/2. Pus remains problem over bone. Rest of graft okay.

21 "8/7. Skin graft taking okay. Some granu-
22 lation tissue over tibia.

23 "8/8. Healing nicely.

24 Q In those latter two notes, is there any
25 indication that the latter part of the graft was not taking?

1
2 A On the 8/7 note it says that the ~~664~~ was
3 covered by granulation tissue not skin. That means in
4 this instance in my belief that he has an infected area
5 of tissue which is known as granulation tissue overlying
6 the tibia and it says so right here.

7 Q That would be a problem, in your opinion?

8 A It would be.

9 Q That would not be part of the healing process,
10 the granulation?

11 A It's healing--

12 Q It is one of the things that you get as
the wound starts to heal up?

14 A Yes, it is.

15 Q And the next day the note is "healing
16 nicely"?

17 A Yes.

18 Q May I ask that you read the 9/1 note.

19 A "9/1. Cast"-- I'm sorry. "Cannot tolerate
20 cast. Long leg cast. Bed rest. Probably infected

21 9 June, with drainage from wound and two
22 areas below.

23 Q Now, Doctor, following this, we all under-
24 stand now that Mr. Lennon was first on the orthopedic
25 ward where he was permitted to change his own bandages,

1
2 and we heard various opinions expressed as to that pro-
3 cedure. Then he was taken off that ward and put onto
4 another ward for a few weeks, and then he was transferred
5 back to the orthopedic ward, when he again had problems.

6 Would you turn your attention to that point
7 I believe which begins Exhibit 2, when he came back to
8 the orthopedic ward and tell us again what his problems
9 were again.

10 MR. KELNER: What's the date, please?

11 MR. RUDOFSKY: I believe it's September
12 18. I will go by whatever the record indicates.

13 A When he came back it is not dated, but it
14 appears to be the first written note in the record.

15 Q You don't have to read it. You can tell us
16 what his problems were at that point.

17 A That the patient had developed a drainage
18 with pus and X-ray evidence of chronic infection and no
19 evidence of union at the time of his admission.

20 MR. KELNER: May the record indicate that
21 that is the hospitalization of September 18, '72
22 to October 24, '72; is that correct?

23 MR. RUDOFSKY: Yes, that is Exhibit 2.

24 Q I want to direct your attention to the
25 September 18, 1972 culture which is found in Exhibit 4,

1
2 and tell us what organisms were present at that time.

3 A At the time he was staphylococcus aureus
4 coagulase positive. Also beta streptococcus, not Group A
5 and not Group D. And pseudomonas aruginosa.

6 Q Pseudomonas we already discussed. This
7 was the second but apparently the last time that was
8 cultured.

9 A Yes.

10 Q And the streptococcus not Group A, not Group
11 D, did that ever reappear?

12 A Not to my knowledge.

13 Q Is it safe to say--and please correct me if
14 I'm wrong--that the staphylococcus coagulase positive,
15 that this became Mr. Lennon's continuing problem and was
16 the primarily destructive agent in his osteomyelitis?

17 A I wouldn't accept the word "became." The
18 last culture before that was taken on July 18, 1972. He
19 remained in the hospital and had an operative procedure on
20 July 28. He was not discharged until September 25. If
21 you accept that it became -- if you mean did it become
22 on July 19 or sometime after July 19, I accept your
23 conclusion.

24 (Continued on the next page)
25

CROSS-EXAMINATION

BY MR. RUDOFISKY: (Cont'd.)

Q The first evidence that he had staphylococcus positive, is the September 18th culture, is that correct?

A If you mean --

Q First definitive lab evidence?

A The first time any culture was taken after September 18th, was on September 18th.

Q Can you tell us what are the common sources of staphylococcus coagulase positive?

A Well, staphylococcus aureus coagulase positive is perhaps the most common of all bacterial organisms found in a wound, that is any area of the body that has been penetrated by an object and becomes infected. It is the most likely of all organisms to have a staphylococcus aureus infection.

Q Is there any way of knowing, once it is found such as here, where it came from, how it got into the wound?

A No.

Q In Mr. Lennon's case could it have been when he was permitted to change his dressings, which you have testified and other doctors testified was not the perfect thing to let him do, by any means, is that correct? That's

Koven-cross

one of the places it could have come from?

A Possibly.

Q But that's not necessarily so, correct?

A It's not definitive, no.

Q Can you tell us, with any degree of medical certainty, if that is where the organism came from?

A I can't tell you with any degree of medical certainty, where this organism specifically came from, no.

Q Well he has got it now, doesn't he -- on September 18, 1972, and thereafter this was -- this is what the problem was in this case -- not the legal problem but the medical problem, is that correct?

A Well --

MR. KELLNER: That is objected to, your Honor. The medical problem is intertwined with the legal one.

Q This was the insidious viral organism that in your opinion ultimately led to the amputation?

MR. KELLNER: That is objected to. Their own doctor said pseudomonas was a destructive agent --

MR. RUDOFSKY: We had two reports of pseudomonas and despite the long hospitalization after this, pseudomonas does not appear. You can't take it in the summer of '72 and make the cause of

Koven-cross

the amputation in the fall --

MR. KELLNER: It's an issue for the record.
Counsel is trying to to restrict it to one of
bacterial strains --

BY MR. RUDOFISKY:

Q Was pseudomonas a problem for this patient after
September of '72?

A Not to my knowledge.

Q Was staphylococcus aureus coagulase positive,
was that a problem for him?

A Yes, it was.

Q This is the first time in Mr. Lennon's case
that this organism was cultured?

A Yes.

Q Did -- was there a sensitivity test along with
that culture?

A Yes, there was.

Wait a minute. Let me make sure. Yes, there
was.

Q Was this organism sensitive to cephalothin?

A Yes.

Q And among the various forms that -- is that
antibiotic, by the way?

A Yes.

Q Does it come in the form kelfin and is it known also as kelfex?

A Yes.

Q Is one of the appropriate treatments for staphylococcus aureus coagulase positive to order keflin or kelfex for the patient?

A Yes.

Q Was that done in this case?

A Yes.

Q Were the appropriate dosages given, as far as you can tell?

A The indicated doses were proper.

Q Based upon your review of the records in this case, you have an opinion as to whether the treatment was effective?

MR. KELLNER: What date was that?

MR. RUDOFISKY: I believe September 18th, continuing onward until the patient's discharge.

THE WITNESS: On the 24th of October.

Q I believe the record would show it continued onward until the 29th of December -- the ultimate discharge from the Navy. That is Exhibit 3.

A What was the question; was the treatment proper?

Koven-cross

A 671

Q The question was, do you have an opinion based upon your testimony -- excuse me.

Do you have an opinion based upon the records, your prior review of the records, as to whether the kelfin, kelfex treatment for staphylococcus coagulase positive an effective treatment?

A No, it was not.

Q On what do you base that opinion?

A An antibiotic in the presence of osteomyelitis has no positive way of getting to the bone. The infected area of the bone is dead. Dead bone has no circulation. The antibiotic is carried to the bone by the circulatory system, by the blood vessels, the arteries specifically. Therefore, until you remove the dead bone, and the pus, there is no way for that antibiotic to get to it. The only thing that the antibiotic does, it prevents the spread of the infection through the bloodstream to a distant part of the body --

Q Let me ask you this.

A May I finish?

Q Yes. I am sorry.

A -- in other words, the antibiotic per se must be given a chance to get to the area of the involvement. It cannot get there in the presence of dead bone.

Koven-cross

Q What I wanted to know from you is, in this case did -- regardless of whether you agree with the treatment -- did the infection of September 18th, was it effectively treated by the antibiotic and by the subsequent operation in December of 1972. Did the infection subside?

A After the use of the antibiotic and the operation, is that your question?

Q Yes.

A It appears that this was a factor as of the date of discharge.

Q Did the bone heal, the fractured bone?

A Would you refer to a date, please.

Q As of his discharge, was the bone healed?

MR. KELLNER: Give us the date.

MR. RUDOFISKY: December 29, 1972.

A The most significant evidence would be the X-rays and I see as of November 20, 1972, there was no change. But this was prior to the removal -- the operation.

Q Do you recall the -- May 18th, 1973, that you say at the beginning of your cross-examination?

A Yes.

Q Do you recall if that showed a healed bone?

A It appears to, yes.

Q Doctor, I would like to turn your attention

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Kovan-cross

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now -- you can put those aside for a moment -- turning

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your attention to Mr. Lennon's condition.

4

You are presently his treating physician?

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A Yes.

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Q And you have been such since January of '77?

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A Yes.

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(Continued on next page)

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2 Q What are his present complaints? When I use
3 the word "present," I want to refer to the period January
4 1977 to this date, today, so I don't want to confuse
5 anybody, most especially yourself. What are his complaints
6 during this period?

7 A His present complaint is that he has a pain-
8 ful scar. Two things cause that scar to split open, some-
9 times a combination, sometimes separately.

10 One is exposure to cold weather.

11 Two is the use of his prosthesis in pro-
12 longed walking and standing.

13 When this happens he gets a crust of
14 draining material coming out from there.

15 In addition that this would reverse itself,
16 that is if he were to get off his feet or stop using the
17 prosthesis, I think would heal over -- the wound.

18 He also has pain over the lateral side, just
19 below the knee and he also has what is known as a phantom
20 limb. That is, he is very conscious of a sensation in
21 the area that was formerly occupied by his foot and toes.

22 He also is aware that he walks poorly.

23 In addition, he informed me that he was
24 unable to keep a job, had certain social problems.

25 We went through that. These are the

1
2 essential complaints related directly.

3 Indirectly he has certain other problems
4 being an amputee that we talked about.

5 Q Did Mr. Lennon ever tell you that he can't
6 sleep through the night?

7 A I know he has had that problem. I have
8 prescribed sleeping pills for him.

9 Q Have you prescribed any other medication
10 for Mr. Lennon?

11 A Yes.

12 Q What is that?

13 A Valium and Percodan.

14 Q Would you describe what they are and in what
15 strengths?

16 A He is getting five milligrams, which is the
17 normal dosage. The valium is a tranquillizer for anxiety,
18 nervousness. He may take as many but not more than four a
19 d ay, which is the usual dosage.

20 I am not certain exactly how many he takes
21 each day; that would vary with his state of anxiety.

22 He also has taken percodan, which is a pain
23 killer, a rather strong one. The reason he takes it in
24 the strength and full dose that he takes it in has
25 to do with a certain degree of -- I am trying to avoid

1
2 the word "addiction"--

3 Q Drug dependency.

4 A Yes, that has developed.

5 Q When did you prescribe these medications,
6 the sleeping pills, the valium and the percodan?

7 A On March 17, 1977.

8 Q You never prescribed these before for him?

9 A I may have. Previously he was receiving
10 it from another physician and did not require it until
11 March 17th.

12 Q Is that from a recollection that he told you
13 or do you have a note of it?

14 A My note is that he was receiving something
15 from a Dr. Kaplo and possibly somewhere else, but my
16 recollection was that Dr. Kaplo.

17 Q Do you have a note to that effect on his
18 medical chart?

19 A Yes, that he was under the care of Dr. Kaplo.

20 Q Do you have a note as to what medication
21 he was or was not receiving from Dr. Kaplo?

22 A No, that is only from recollection.

23 Q With respect to yourself, you are telling
24 us that you began prescribing these medications on March
25 17, 1977?

1
2 A Yes.

3 Q Have you had an opportunity to discuss with
4 Mr. Lennon whether this medication is effective, the sleep-
5 ing pills or the percodan, the valium or all three of them?

6 A I haven't seen him since that day until
7 today, I believe.

8 Q I assume that it was your professional
9 judgment that this medication would alleviate some or all
10 of his complaints?

11 A Yes.

12 Q Now, in connection with your treatment of
13 Mr. Lennon, have you discussed with him the mode, the
14 manner in which he gets around, both when he can use the
15 prosthesis and when he cannot?

16 A Yes.

17 Q And specifically, have you discussed with
18 him the fact that he lives in an apartment that is not on
19 the ground floor and that is not serviced by an elevator
20 and he must walk up one flight of stairs to get to the
21 apartment?

22 A I don't recall specifically discussing the
23 apartment or its location.

24 Q Mr. Lennon ever tell you that when he can't
25 wear his prosthesis he had to go up the stairs on his

1
2 knee?

3 A That I don't specifically recall being told.

4 Q Did you ever discuss with him how he gets
5 around his apartment when he doesn't have the prosthesis
6 on?

7 A Not specifically, no.

8 Q Did he ever tell you that he crawls to the
9 bathroom at night ?

10 A I didn't ask him that specifically.

11 Q From the medical viewpoint, is there any
12 reason why he couldn't use a wheelchair for getting
13 around his apartment?

14 A Well, he could use anything to get around
15 with, I assume. I don't know specifically--

16 Q Certainly a wheelchair is not contraindicated?

17 A No, but usually patients with his condition
18 use crutches.

19 Q Do they crawl on the floor?

20 A Yes.

21 Q But if they use a wheelchair that obviates
22 the need for--

23 A You usually can't get a wheelchair into a
24 bathroom. Most patients usually use crutches or they
25 crawl.

1
2 Q Would you tell us what you mean by totally
3 disabled? Do you recall saying that?

4 A Yes.

5 One cannot be in the usual sense of the
6 word occupationally employable unless one has special
7 training in something that would require no essential
8 travel, minimal travel, no standing, no walking of any
9 considerable distance. So it would be quite a limited
10 and therefore virtually a total disability.

11 Q His arms are not affected?

12 A No, but you have to get to and from work--

13 Q We understand that. I want to know what you
14 mean by totally disabled.

15 A That he is totally disabled from doing things
16 that two legged persons do.

17 Q Without the prosthesis he can't do what the
18 normal two-legged person can do?

19 A Yes.

20 Q He can sit at a desk and write, couldn't he
21 do that?

22 A Yes.

23 Q He could use the telephone, couldn't he?

24 A Yes.

25 Q He could get around on his crutches, couldn't

1
2 he?

3 A To a limited extent, yes.

4 Q Doctor, do you recall testifying with respect
5 to the possibility that Mr. Lennon may at some point in
6 the future have a revision of his amputation, a revision
7 of his stump?

8 A Yes.

9 Q I believe you testified that that may be
10 required because as far as you can ascertain he presently
11 has a condition known as cellulitis.

12 A Yes.

13 Q Did you refer to it as a bacterial involve-
14 ment?

15 A Yes.

16 Q Could you tell us what kind of bacteria
17 are involved?

18 A That would be determined at the time of
19 surgery.

20 Q You mean it changes from time to time?

21 A It may change, yes.

22 Q What kind of bacteria are involved at the
23 present time?

24 A I don't know specifically. I could go
25 through these records again, but I would assume it's

probably the staphylococcus.

Q Haven't you taken a culture?

A No.

Q It's not required, in your judgment, to take a culture?

A It will be when he is ready for the operation.

Q But at the present time it is not required?

A No.

Q Even though he has an open wound?

A He has no deep-- In other words, the activity is superficial.

Q Surface--

A Surface at the moment.

Q Your judgment is that there is no necessity to do anything further, even to take a culture; is that correct?

A At this time, no.

Q Did you also express the opinion that it was a direct result of the preamputation infection? Do you recall testifying to that?

A It is a going thing, yes.

Q Is it the same infection?

A Presumably it is, yes.

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2 Q When you say "presumably," that's because
3 there is no culture and we don't know, correct?

4 A Essentially, yes, but experience would tell
5 us that this is the same thing.

6 Q If Mr. Lennon has a successful revision
7 of his stump, below the knee, cellulitis is thereby
8 eliminated, what would you say the prognosis will be?

9 A The chances of a success would be about fifty
10 percent, if that's what you mean.

11 Q I understand that.

12 Assume in addition to your testimony we
13 have also heard testimony from Dr. Smith of the Brooklyn
14 VA Hospital, who explained his experience with amputees
15 and the number of cases that he deals with and also his
16 qualifications as an expert were conceded.

17 Assume that he is somewhat more optimistic
18 than yourself as to how successful a revision would be.

19 Just let's assume for the moment he had a
20 successful revision, that the cellulitis was eliminated
21 and the stump was revised by whatever amount of material
22 had to be removed.

23 At that point, based upon your understanding
24 of the case, your understanding of Mr. Lennon's condition,
25 your review of the records, what would the prognosis be?

1
2 A He is still subject to a recurrence if
3 I understand your question correctly.

4 Q At that point is it your opinion that with
5 a reasonable degree of medical certainty that he would
6 be able to use a new prosthesis if the cellulitis was
7 eliminated?

8 A Yes, if it were eliminated permanently, he
9 could also use a prosthesis.

10 Q At that point-- I will withdraw that.

11 MR. RUDOFISKY: I have no further questions.

12 THE COURT: Do you have any?

13 MR. KELNER: Just very brief.

14 THE COURT: Let's move ahead.

15 REDIRECT EXAMINATION
16 BY MR. KELNER:

17 Q The cellulitis thus having persisted for
18 all these years, '72, what are the chances of total removal?

19 A As I stated, the chances are in my opinion
20 not very high and that he would be subject to recurrences
21 even if he had a temporary improvement. I can't say--
22 I think the chances of a recurrence because of the history
23 is quite high.

24 Q Can you tell us if there is any relationship
25 between the number of times that he had these ongoing
infections and the chances of total healing?

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2 A In view of the length of time that has
3 elapsed and the number of breakdowns or episodes of
4 recurring infections that he has had, his chances are
5 lessened.

6 Q Do you recall an opinion that he will be
7 improved or the cellulitis totally removed from him?

8 A I have stated to the patient many times that
9 he would have a fighting chance but only a chance.

10 Q That's in relation to the question of an
11 operation or revision--

12 A Yes.

13 Q I was dwelling on the cellulitis, on the
14 overall picture, is that what you mean?

15 A Yes.

16 Q If I understand you correctly, and please
17 correct me if I am wrong, my understanding was that you
18 have taken the position that you cannot recommend that he
19 undergo a revision operation.

20 A I stated that the surgery is highly hazardous
21 and this was explained to the patient and that it would
22 be nothing that I could recommend.

23 He would have to spontaneously request
24 that he take the chance in this situation.

25 Q Have you and he had this discussion since

1
2 he came under hour care?

3 A Yes.

4 Q Has he made any indication at all to the
5 effect that he is willing to take that chance?

6 A Yes, he has.

7 Q What has he said?

8 A He said he is going to arrange a dis-
9 cussion further about surgery at the termination of this
10 proceeding.

11 Q Has he indicated he had a definite idea as
12 to whether he will go through with it or discuss it?

13 A No.

14 Q Doctor, I will ask you to assume--

15 MR. KELNER: Just a few questions.

16 THE COURT: I am going to ask you to submit
17 findings and conclusions.

18 Q Doctor, the series of questions that have
19 been put to you this morning, on cross-examination, are
20 there any areas-- Withdrawn.

21 I am going to ask you to assume in relation
22 to the questions and answers that have occurred this
23 morning, I will ask you to assume that Dr. Shelton testi-
24 fied that the number of cultures, either four or five, and
25 that Dr. Shelton has told this Court that they were too
few; is that in accordance with what you told us?

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2 A Yes.

3 Q I ask you to assume that Dr. Shelton testi-
4 fied that the initial antibiotics were not enough in
5 potency and insufficient to handle or to combat pseudo-
6 monas; is that in agreement with everything that you
7 told this Court?

8 A Yes.

9 Q And I ask you to assume that Dr. Shelton
10 testified that no medication was given for the pseudomonas
11 which he described as a very serious problem; is that in
12 agreement with your own testimony and your own opinion?

13 A Yes.

14 Q I am going to ask you to assume that Dr.
15 Shelton, the defendant's expert, testified that permitting
16 the patient in this case to change his own dressing,
17 he being a layman, untrained in the need for sterile
18 dressings and his own person to be sterile, he said that
19 that was improper procedure because of the infection
20 process that was already in place.

21 Would that be in agreement with you, sir,
22 that it was improper to permit the patient to change
23 his own dressing only four days after open surgery on
24 his tibia?

25 A Yes.

1
2 THE COURT: Is that what he said, or did he
3 say it left a lot to be desired?
4

5 MR. KELNER: Yes, that was another one.

6 Q I am going to ask you to assume-- Withdrawn.

7 I am going to ask you to assume that Dr.
8 Shelton testified that it was improper for a doctor not
9 to read nurses' notes on making his rounds, and that Dr.
10 Neviasser testified that it was proper not to read nurses'
11 notes. I can't recall if I put that to you directly.

12 What is your opinion regarding the necessity
13 of a doctor reading nurses' notes?

14 A It certainly--

15 THE COURT: I don't think that is a fair
16 assumption. What he did say occasionally -- he
17 did not read the nurses' notes, but had the nurse
18 tell him what the notes consisted of, if I recall,
19 or something to that effect. In either event, is
20 that proper?

21 Q Is it proper for a doctor to have a nurse
22 tell him the highlights of the nurses' notes--

23 THE COURT: And therefore no need to
24 review them?

25 A Notes should be read.

Q Why?

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2 A Because there are three shifts of nurses, and
3 you may only be seeing one nurse.

4 Q Doctor, with regard to the suction and drain-
5 age that you stated should have been instituted, I believe,
6 on July the 6th, when pus was found, did you say that
7 will only go to the surface areas of the tissues of skin
8 and the fractures of the leg or does it go down to
9 the bone where there are infectious processes putting out
10 this pus--

11 MR. RUDOFISKY: I would object. There is
12 no such showing on July 6th.

13 THE COURT: Yes.

14 Q What did the pus process on July 6 indicate,
15 1972?

16 A That there was pus throughout the area going
17 to the bone in my opinion.

18 THE COURT: Going to the bone?

19 THE WITNESS: Or coming from it. We can't
20 tell which.

21 Q Sir, the failure to institute the suction
22 and drainage process with what you told us would include an
23 antibiotic bathings, was that a component part of
24 the continuing infection and the loss of the leg?

25 A In my opinion it was.

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3 MR. KELNER: I think that concludes just a
4 short redirect examination. Because of the fact
5 that several weeks have gone by, would your Honor
6 permit a very short summation?

7 THE COURT: I would rather-- I remember the
8 case. I would rather you'd submit findings and
9 conclusions and the Court will make up its mind.

10 We have the minutes.

11 MR. KELNER: Is that findings of fact and
12 conclusions of law?

13 THE COURT: Both.

14 MR. KELNER: I don't know what your pre-
15 ferred procedure is.

16 THE COURT: You may also submit a summary in
17 accordance with the findings of fact and conclusions
18 of law.

19 MR. KELNER: I see. Do you have some sort of
20 specified time?

21 THE COURT: Suit yourself.

22 MR. KELNER: Say within the next ten days?

23 MR. RUDOFISKY: I can't promise within the
24 next ten days.

25 THE COURT: Let's have it completed by May 20.

MR. RUDOFISKY: We address the jurisdictional

question and everything in that?

THE COURT: Yes.

MR. KELNER: Do we exchange?

THE COURT: Yes.
